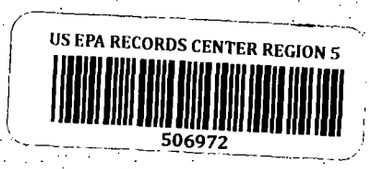

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota, by the Minnesota Pollution Control Agency,

Plaintiff,

vs. COURT FILE NO. 670767

Reilly Tar & Chemical Corporation,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTIONS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

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Dated: June 21, 1978

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STATE OF MINNESOTA

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DISTRICT COURT

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTIONS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

PROCEDURAL SETTING

The plaintiff State of Minnesota, by the Minnesota Pollution Control Agency (hereinafter "State"), served its motion for leave to amend the complaint in this action on April 12, 1978. The City of St. Louis Park (hereinafter "City") served a motion for intervention on April 19, 1978. 1/ After the State had granted several continuances of the hearing date for its motion, the Chief Judge ruled on June 9, 1978, that the State's motion for leave to amend complaint and the City's motion for intervention would be set for hearing on June 22, 1978.

On June 16, 1978, the State was served with defendant Reilly Tar & Chemical Corporation's (hereinafter "Reilly Tar") pleadings in opposition to the motion for leave to amend complaint, along with separate motions by Reilly Tar seeking a dismissal of the action or, in the alternative, a substitution of the City as the sole defendant.

This memorandum, along with certain affidavits, is submitted in opposition to Reilly Tar's motions and in support of the State's

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1/ The State has no objection to the City's motion for leave to intervene in the action and believes that intervention is fully warranted under the circumstances.

motion for leave to amend the complaint.

FACTUAL BACKGROUND

The original complaint in this action was filed and served by the State and City as joint plaintiffs on October 2, 1970. The claims arose from Reilly Tar's long-standing practice of disposing of its coal tar and creosote wastes on the surface of the ground at its site in St. Louis Park, Minnesota. Affidavit of Sandra S. Gardebring (April 11, 1978)(hereinafter "Gardebring Affidavit") at 1. These wastes are thick, black, and give off a noxious smell. The complaint sought injunctive relief enjoining Reilly Tar from any further pollution of air and surface water.

At the time of the filing of the original complaint, the State had no evidence of a risk to public health from groundwater contamination resulting from Reilly Tar's activities, Gardebring Affidavit at 1-2, although the State feared that such a health risk might eventually be discovered. See Affidavit of Dale L. Wikre (June 19, 1978)(hereinafter "Wikre Affidavit") at 2. In a letter of June 19, 1970, from the Vice President of Reilly Tar to the City, Reilly Tar specifically and vigorously denied that the soil on the site was contaminated. See Exhibit 1 to Affidavit of Mary E. Wyatt (June 19, 1978)(hereinafter "Wyatt Affidavit") at 1. On the basis of several groundwater samples collected prior to the filing of the complaint, the State was unable to ascertain that any significant injury to the groundwater had, in fact, occurred. See Wikre Affidavit at 2. Accordingly, the State did not seek damages for injury to the groundwater or injunctive relief directing the rehabilitation of contaminated groundwater.

At the time of filing its original complaint, the State was aware that some injury (pollution of air and surface waters) had resulted from Reilly Tar's conduct, but was also aware that the

ultimate injury to groundwater resulting from Reilly Tar's conduct remained unknown and unpredictable. Id. at 2; Gardebring Affidavit at 1. Because of the recognized potential for groundwater pollution, the State has never waivered from its position that dismissal of this action will not be proper until the ultimate injury to groundwater has become sufficiently known or predictable to determine whether further abatement measures are necessary.

The State filed its Note of Issue on December 18, 1970. Thereafter, the City and Reilly Tar commenced negotiations concerning the possible purchase of the site by the City coupled with closure of the plant. Reilly Tar concedes that the State did not take part in these negotiations. See Memorandum of Law in Support of Motions to Dismiss or Substitute and In Opposition to Motions to Amend and Intervene (June 16, 1978) (hereinafter "Reilly Tar Memorandum") at 8. On July 23, 1971, counsel for Reilly Tar urged the State to ask the Clerk to strike the case for settlement. See Exhibit 2 to Wyatt Affidavit. This was done by counsel for the City on July 30, 1971, and the Clerk was requested to have the case "stricken subject to reinstatement by counsel at any time." 2/ See Exhibit 3 to Wyatt Affidavit.

On or about July 21, 1972, Reilly Tar ceased its operations after having sold its property to the City. Gardebring Affidavit at 1. The purchase agreement between the City and Reilly Tar, dated April 14, 1972, provided that the City would deliver to Reilly Tar at the time of closing dismissals of the action executed by the City and by the State. See Exhibit B to Affidavit of Thomas J. Ryan (May 8, 1978) (hereinafter "Ryan Affidavit") at 5. The State was not a party to the purchase and sale negotiations or to the purchase agreement between the City and Reilly Tar. At no time did counsel for the State agree that the State would, in fact, deliver a dis-

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2/ Correspondence by counsel for the City to Reilly Tar's counsel at that time confirms the State's view that the City and Reilly Tar were engaged in an endeavor which might end the surface water pollution problem. See Exhibit B to Reiersgord Affidavit ("We fully expect the company to cease its refining operations . . . and to solve its present surface water runoff problems").

missal of the lawsuit at the time of closing or at any other time. Affidavit of Robert J. Lindall (June 20, 1978)(hereinafter "Lindall Affidavit") at 1-2. The clause in the purchase agreement which provided for delivery of the State's dismissal by the City was apparently based on the hope of the City and Reilly Tar that the State could be convinced, before the date of closing, that all injuries from Reilly Tar's conduct had become known or sufficiently predictable to warrant dismissal of the State's action.

When the time for closing arrived, the State refused to deliver a dismissal of the action. Counsel for the State informed the City by letter dated June 15, 1973, that the State would not be in a position to consider a dismissal of the action against Reilly until the State had received and reviewed a proposal for the elimination of potential pollution hazards remaining at the site. See Exhibit 4 to Wyatt Affidavit. Nevertheless, the City purchased the property on June 18, 1973, and dismissed its action against Reilly Tar. See Exhibits D and E to Ryan Affidavit. On the next day, June 19, 1973, the City entered into a Hold Harmless Agreement with Reilly Tar which recited the fact that the State had refused to deliver a dismissal of its complaint. See Exhibit C to Ryan Affidavit at 1. The construction and application of that Hold Harmless Agreement is the subject of a request for declaratory relief in the complaint in intervention which the City now seeks to file.

Subsequent to the sale of the property to the City, during which a document was executed by Reilly Tar expressly noting the State's refusal to deliver a dismissal of its complaint, id., Reilly Tar has never approached the Court, formally or informally, to seek a dismissal of the action by the State, or to complain about the State's delay in bringing the action to trial. Indeed, prior to service on April 12, 1978, of the State's motion for leave to amend its complaint, there has been only one brief exchange of correspondence between counsel for the State and counsel for Reilly Tar. On July 9, 1976, in light of the first phase report of an intensive on-site

groundwater investigation by the Barr Engineering Company, counsel for the State informed counsel for Reilly Tar by letter that the State still considered the lawsuit to be viable, active litigation. See Exhibit 5 to Wyatt Affidavit at 2. The July 28, 1976, reply by counsel for Reilly Tar reconfirmed his awareness that the State had not, in fact, delivered a dismissal of the action, but stated his belief that the litigation was "defective" and "should be dismissed" because the State had acted in an "ex party [sic]" manner and had not given proper advance notice of the lawsuit. 3/ See Exhibit 6 to Wyatt Affidavit.

On several occasions subsequent to the sale of the property, the City has sought to obtain from the State a statement of the conditions under which a dismissal of the State's action against Reilly Tar might be contemplated. In response to these requests, the State has consistently informed the City that it will not be possible to set forth the conditions under which such a dismissal would be acceptable until ongoing investigations into the nature and extent of the ultimate injury from Reilly Tar's conduct have been completed. Wikre Affidavit at 5.

Meanwhile, since the filing of the original complaint, there have been substantial ongoing efforts by the State, the City, and various private consultants to investigate and quantify the precise nature and extent of the injury caused by Reilly Tar's conduct, and to ascertain the appropriate remedial measures to abate any remaining pollution and avoid further injury. Gardebring Affidavit at 2. These investigations have been time-consuming and costly. The degree and significance of the groundwater contamination cannot

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3/ In State, by Pollution Control Agency v. U.S. Steel Corp., 240 N.W.2d 316, 319 (Minn. 1976), the Minnesota Supreme Court ruled three months prior to this letter that the Minnesota Pollution Control Agency is not required to resort to internal administrative procedures prior to bringing suit in a district court to secure compliance with State law. The State respectfully submits that Reilly Tar's assertion of inadequate consultation by the State prior to commencement of this suit, see Reilly Tar Memorandum at 3-4, 6, is without merit.

be ascertained without studies probing such factors as the nature and solubility of the contaminants; the nature and permeability of various soil layers; the location, nature and topography of various bedrock layers; the location and water quality of various aquifers; 4/ and the direction and rate of movement of waters contained in each aquifer. Id. The investigations have been extraordinarily complex because the groundwater underneath the site is found in several levels of aquifers, rather than in one simple pool. Wikre Affidavit at 1-2; Affidavit of Donald R. Albin (June 19, 1978). Indeed, the United States Geological Survey has now proposed to the State a three year computer-modeling program at a total cost of $400,000 to attempt to ascertain appropriate remedial measures. Wikre Affidavit at 5. The Legislature of the State of Minnesota has on two occasions appropriated public funds for these investigations -- first in the amount of $110,000 in 1975 and again in the amount of $200,000 in 1978. Gardebring Affidavit at 3. The nature of these investigations is more fully described in the Wikre Affidavit at 3-6. The extraordinary time-consuming nature of these investigations has in no way been denied by Reilly Tar.

As a result of these intensive ongoing investigations, the State now has, for the first time, new and growing evidence that massive and extremely hazardous groundwater pollution is, and will in fact continue to be, the ultimate injury resulting from the very conduct complained of in the original complaint -- i.e., Reilly Tar's practice of discharging coal tar and creosote wastes to the ground surface. Gardebring Affidavit at 2-3. The new evidence shows that the coal tar and creosote wastes discharged by Reilly Tar contained carcinogenic substances (polynuclear aromatic hydrocarbon or PAH substances, such as benzpyrene) which were not known by the

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4/ An "aquifer" is an underground layer of rock, sand, or other material containing water, into which wells may be sunk.

State to be present in the soil or groundwater at the time of filing of the original complaint. Id. at 3. See proposed Amended Complaint, paragraph 5. The hazardous properties of these substances and their potential health effects on public drinking water supplies were assessed in a report of the Minnesota Department of Health completed in October of 1977. Gardebring Affidavit at 3. The new evidence further shows that these carcinogenic substances have migrated deep into the soil and have, in fact, reached the groundwater. Id. Finally, the new evidence now shows that the health hazard caused by Reilly Tar's conduct is of a continuing nature. Id.

The potential impact of this ultimate injury from Reilly Tar's conduct is now known to be profound. One of the aquifers which is threatened by contamination from these carcinogenic substances is the Prairie du Chien-Jordan aquifer. Wikre Affidavit at 5. Available information indicates that water from that aquifer is used as a source of drinking water by approximately one-quarter of a million people. Id. Moreover, the Prairie du Chien-Jordan aquifer underlies almost the entire Twin Cities' Basin, and statistics of groundwater use in 1970 indicate that almost 75% of all groundwater used in the Twin Cities area at that time came from the Prairie du Chien-Jordan aquifer. Id.

It is on the basis of this new evidence that the State has filed its motion for leave to amend its complaint. The State has previously submitted its arguments in support of the motion for leave to amend. See Memorandum of Law in Support of Plaintiff's Motion for Leave to Amend Complaint (April 11, 1978).

ARGUMENT

I. REILLY TAR'S MOTION TO DISMISS ON THE BASIS OF A PURPORTED 1972 SETTLEMENT AGREEMENT BETWEEN THE STATE AND REILLY TAR IS AN UNTIMELY AND INADEQUATELY SUPPORTED MOTION FOR SUMMARY JUDGMENT ON A NEWLY ASSERTED CAUSE OF ACTION FOR BREACH OF CONTRACT

A. Reilly Tar's Claim that There Was a 1972 Settlement Agreement Between the State and Reilly Tar is Devoid of Evidentiary Support

Even a cursory examination of the Reilly Tar Memorandum demonstrates that the cornerstone of Reilly Tar's defense to the State's present action is a claimed "meeting of the minds" between the State and Reilly Tar on an alleged settlement of this action at an unspecified time in 1972. This claimed settlement of the original cause of action permeates the memorandum. See, e.g., Reilly Tar Memorandum at 1, 8-19, 24, 26-39, 41, 46-49, 53-56. The evidentiary support proferred to demonstrate the "meeting of the minds" is so extraordinarily weak that a complaint setting forth Reilly Tar's present allegations as to the purported agreement and subsequent breach would be subject to dismissal under Minn. R. Civ. P. 12.02(5) for failure to state a claim for which relief may be granted.

The only contemporaneous facts alleged in support of the so-called 1972 "meeting of the minds" consists of the following statements set forth in the affidavit of Reilly Tar's attorney:

> That the City was represented in the negotiations by Wayne Popham and Rolfe Worden. That Worden advised affiant during said negotiations that the Pollution Control Agency would go along with anything the City and the Company would agree to. Accordingly negotiations with the City were based on an understanding that the City had obtained the acquiesence from the State to any contract that the parties would make. That is why the purchase agreement provided that the State would dismiss the action when the real estate transaction was closed. The company relied upon the representation by counsel for the City that the City had obtained the consent of the State to that provision of the purchase agreement.
>
> . . . .
>
> Then just before the final payment was to be made in June, 1973, the counsel for the City, Rolfe Worden,

> told affiant that there had been a change in personnel in the offices of the Attorney General representing the Pollution Control Agency and that the present counsel for the Pollution Control Agency was unfamiliar with the case and the settlement agreement to which the prior counsel had agreed, and that now the Pollution Control Agency refused to give a dismissal of the case. . . .

Affidavit of Thomas E. Reiersgord (June 12, 1978)(hereinafter "Reiersgord Affidavit") at 3, 4. 5/

There are several important things to note about this purported evidence of a "meeting of the minds" between the State and Reilly Tar:

(1) The State took no part in the negotiations over the purchase of the land, see Reilly Tar Memorandum at 8, and Reilly Tar nowhere asserts that any representative of the State was present at any meeting where the alleged assurances were made by counsel for the City;

(2) No affidavit or other exhibit declares that the City's counsel had based his alleged assurances on conversations with any named counsel for the State;

(3) No affidavit or other exhibit declares that the City's counsel had, in fact, spoken to anyone who had any authority to bind the State;

(4) Reilly Tar makes no claim that the City's counsel had implied, apparent, or actual authority to serve as the State's agent with respect to settlement of the litigation;

(5) Any claim by Reilly Tar that the City's counsel had authority to represent the State with respect to settlement of the litigation or any other matter would run afoul of Minn. Stat. §8.06 (1976)("the legal business of the state shall be performed

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5/ The affidavit of Reilly Tar's president repeats the allegation that "the City . . . assured representatives of the Company that if the City and Company could agree to sale terms for the property that the Pollution Control Agency would go along with whatever agreement the City and Company could reach." Ryan Affidavit at 3 (emphasis supplied). However, Mr. Ryan does not claim to have any first-hand knowledge of such assurances.

exclusively by the attorney general and his assistants" unless certain rigid procedures are followed to employ outside counsel);

(6) The Special Assistant Attorney General who in fact represented the State in 1972, Robert J. Lindall, has sworn that he never made any assurances to counsel for the City, counsel for Reilly Tar, or anyone else, that the State would dismiss the action under any conditions, and has further sworn that he would never have made such a statement because actions initiated at the request of the Minnesota Pollution Control Agency could not be settled without consulting his client, the nine-member citizen board of the Agency. See Lindall Affidavit at 2.

The contemporaneous evidence that the State agreed to a settlement of this action in 1972 is, thus, no evidence at all. In an effort to bolster this lack of real evidence, Reilly Tar has attempted to weave a web of circumstantial evidence to show later "acquiescence" or "acceptance" of the settlement by the State. In doing so, Reilly Tar has focused on isolated instances of human behavior over the succeeding years and has tried to interpret that behavior to fit its preconceived pattern of an accomplished settlement. Thus, Reilly Tar asserts that, "with the exception of its failure to deliver the dismissal in June of 1973, the PCA . . . has . . . accepted this settlement until its belated efforts to renew this lawsuit." Reilly Tar Memorandum at 30. The problem with this interpretation of history is that Reilly Tar has neglected to inform the Court of significant pieces of the puzzle which simply do not fit its theory. A brief reference to other circumstantial evidence in support of the State's theory that there never was any settlement by the State at any time demonstrates the failure of Reilly Tar's circumstantial proof.

First, when confronted with the purported breach of settlement agreement at the closing in 1973, Reilly Tar did not approach the Court to inform it that the State had reneged on a binding agreement. It is not likely that an attorney who had been truly deceived about a settlement agreement would ignore the breaching party's refusal to issue a promised dismissal.

Second, Reilly Tar's circumstantial case is refuted by the contents of Special Assistant Attorney General Jay Heffern's letter of July 9, 1976, to Reilly Tar's counsel. Exhibit 5 to Wyatt Affidavit. In that letter, counsel for the State informed Reilly Tar's counsel about the serious contamination problem being discovered beneath the Reilly Tar site, and concluded:

> You are advised that the MPCA considers the above-referenced suit to be viable and that it continues to remain active litigation. This notice is being sent to insure that you continue to be involved in this matter in whatever manner you deem appropriate.

Id. at 2. This letter cannot be squared with Reilly Tar's claim that the State has "accepted" the alleged settlement from 1973 to the present. See Reilly Tar Memorandum at 30.

Third, Reilly Tar has failed to acknowledge the existence of a reply by its legal counsel to Mr. Heffern's letter. On July 28, 1976, Thomas E. Reiersgord wrote to counsel for the City about Mr. Heffern's letter. See Exhibit 6 to Wyatt Affidavit. Mr. Reiersgord did not accuse the State of violating any purported 1972 settlement agreement. He did not assert that the action had, in fact, been settled in 1972 by a "meeting of the minds" of all parties. Instead, he asserted that the State's complaint had been filed on an "ex party [sic]" basis, urging that the litigation was therefore "defective" and "should be dismissed on that ground." Id. (emphasis supplied). If Mr. Reiersgord believed in 1976 that the State had entered into a 1972 settlement agreement and subsequently breached that agreement, it is inconceivable that he would fail to mention this belief and would, instead, focus on an alleged procedural irregularity in the

State's complaint.

Finally, although the State believes that Reilly Tar exaggerates the importance of the choice of the words "initiate a proceeding" in a 1975 hearing officer's report, see Reilly Tar Memorandum at 18, the State would note that Reilly Tar's own choice of words a mere two months ago belies its claim that it has believed this action to have been terminated. In Reilly Tar's Notice of Claim and Demand for Performance of Hold Harmless Agreement and Purchase Agreement and Tender of Defense (April 24, 1978), filed with its moving papers, the company asserted:

> This attempted revival of said action by the State of Minnesota is precisely the eventuality the hold harmless agreement and the terms of the purchase agreement were designed to protect against by the company.

Id. at 4 (emphasis supplied).

The State respectfully submits that the selectively isolated circumstantial evidence cited by Reilly Tar in its memorandum cannot create a "meeting of the minds" where none existed, and that the conduct of Reilly Tar's own attorney conclusively demonstrates that the company has never, in fact, believed that a binding settlement with the State was ever reached.

B. In An Effort to Tailor the Facts to Fit Within Established Judicial Precedents, Reilly Tar Has, in its Memorandum, Distorted the Insignificant "Evidence" of a Settlement Agreement Set Forth in Its Affidavits

As we have seen, Reilly Tar's proferred evidence of a "meeting of the minds" between it and the State in 1972 is extraordinarily weak. Based on the meagre "evidence" of the Reiersgord Affidavit, Reilly Tar asserts in its memorandum that a strong proof of a "meeting of the minds" between the State and Reilly Tar has already been made out, yet then urges the Court to speculate on the existence of additional substantial evidentiary "facts" which are nowhere to be found in the underlying affidavits or exhibits but are essential if a binding settlement agreement is to be found. See, e.g., Reilly Tar Memorandum at 28 (asserting, unlike the affidavits, that "the PCA . . . continuously

assured Reilly that the PCA would accept a settlement" [emphasis supplied]); id. (recharacterizing the vague statements attributed to the City's attorney as "the PCA's promise that it would accept the settlement" [emphasis supplied]); id. at 32 (referring, unlike the affidavits, to "the activities of counsel for the PCA" [emphasis supplied]); id. at 33 (making the wholly fabricated statement that the purported settlement with the PCA was "negotiated by its attorney" [emphasis supplied]).

Reilly Tar repeatedly utilizes such unjustified embellishments and distortions of the factual record to support its contention that the State is barred from seeking a trial on its claims. For example, the Reilly Tar Memorandum at 27-29 asserts the existence of a promissory estoppel pursuant to Restatement of Contracts (2d) Section 90. Obviously, that doctrine requires an affirmative promise by a person who has authority to bind the party who is to be estopped. Because the affidavits proferred by Reilly Tar are insufficient to demonstrate any such promise (no person acting on behalf of the State is ever named), the memorandum's assertion that "the PCA . . . continuously assured Reilly" that it would accept a settlement negotiation, Reilly Tar Memorandum at 28, is wholly unsupported and simply invented for purposes of the argument. With the recognition that this assertion is unsupported by any evidence, the promissory estoppel argument collapses.

Another example of Reilly Tar's creative use of its affidavits occurs when discussing caselaw on the power of an attorney to bind his client in settlement negotiations. Id. at 32-33. In an attempt to skew the facts of this case to meet those of established precedents, Reilly Tar asserts in its memorandum that counsel for the Minnesota Pollution Control Agency (nowhere named) "was clothed with apparent

authority" to accept a compromise agreement and that the State "is bound by the settlement negotiated by its attorney." Id. at 33. For Reilly Tar to suggest in its memorandum that an attorney for the State "negotiated" (much less agreed to) anything in 1972 is wholly unsupported, given the fact that no affidavit or exhibit alleges or states that any counsel for the State said anything to anyone about settlement prior to the 1973 statement by State's counsel that dismissal would not be granted.

Stripped of the misleading factual embellishments contained in its memorandum, Reilly Tar's theory of a "meeting of the minds" in 1972 rests on nothing other than the implied assertion that counsel for the City had authority to bind the State to a settlement agreement, and did in fact do so. This assertion is obviously without merit, see Minn. Stat. §8.06 (1976), and should be rejected.

C. Reilly Tar is Engaged in an Inappropriate Attempt to Obtain Summary Judgment on a Newly Asserted Cause of Action for Breach of Contract

Reilly Tar's dismissal motion, insofar as it relies on the purported 1972 settlement agreement and the State's alleged breach thereof in 1973, is really an attempt to obtain summary judgment on a newly asserted cause of action for breach of contract. Such relief is inappropriate for three reasons. 6/

6/ The State would also note that motions seeking relief in the nature of summary judgment are to be served "at least 10 days before the time fixed for the hearing," Minn. R. Civ. P. 56.03, and that the State was served with Reilly Tar's motions only four days before the return date thereon. Indeed, none of Reilly Tar's motions were served in a timely manner, because Minn. R. Civ. P. 6.04 requires service of written motions "not later than five days before the time specified for the hearing."

First, the evidentiary record proferred in support of the motion is so sparse that, were the allegations set forth in a complaint seeking the enforcement of a contract, the complaint would be subject to dismissal for failure to state a claim for which relief may be granted. See Minn. R. Civ. P. 12.02(5). Reilly Tar has failed to allege the essential elements of a binding contract, for nowhere are there sufficient facts alleged to establish that anyone with authority to bind the State made either an offer or an acceptance.

Second, even had Reilly Tar pleaded sufficient evidentiary allegations to survive a motion to dismiss for failure to state a claim, there would remain genuine issues of material fact precluding summary judgment. See Minn. R. Civ. P. 56.03. The attorney who represented the State during the time of the alleged "meeting of the minds" has denied making any commitment to any person with respect to dismissal of the action, and has further stated that he would not have made such a commitment without consulting his client, the nine-member citizen board of the Minnesota Pollution Control Agency.

Third, Reilly Tar's present assertion of a cause of action for breach of an alleged settlement agreement is being raised for the first time five years after the alleged breach took place. Due to this delay in asserting its alleged rights, Reilly Tar's new claim is subject to the equitable doctrine of laches. If there had, in fact, been an agreement to deliver a dismissal of this action, that agreement would have been openly and notoriously breached in 1973 when the State made it clear that no dismissal was forthcoming. The five-year delay before bringing an action to remedy this alleged breach is wholly unexplained. See Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 116 (Minn. 1977); General Minnesota Utilities Co. v. Carlton County Cooperative Power Association, 221 Minn. 510, 524, 22 N.W 2d 673 (1946); St. Paul, Minneapolis & Manitoba Ry. v. Eckel, 82 Minn. 278, 281-82, 84 N.W. 1008 (1901).

D. Conclusion With Respect to the Alleged Settlement Agreement

The State respectfully submits that Reilly Tar's assertion that there was a "meeting of the minds" of all parties in 1972 to dismiss the State's action is a product of Reilly Tar's wishful thinking. The State was a party plaintiff to the original proceedings. At no time, according to the affidavits, did counsel for the State or any othe authorized representative of the State take part in the settlement negotiations between the City and Reilly Tar. The City had no power to speak for the sovereign State of Minnesota. 7/ The attorney who was counsel for the State at that time has flatly denied making a settle ment agreement with anyone. Reilly Tar's assertion that this proceeding was settled by the State in 1972 is wholly without evidentiary support, and should be rejected.

II. REILLY TAR'S MOTION TO DISMISS FOR LACK OF JURISDICTION SHOULD BE DENIED

A. Under Minnesota Law, a Lawsuit, Once Commenced by Service of a Summons and Complaint, Remains Pending Until Final Judgment Has Been Entered and Satisfied

Minn. R. Civ. P. 3.01 provides that "[a] civil action is commenced against each defendant when the summons is served upon him or is delivered to the proper officer for such service." Minn. R. Civ. P. 54.01 defines a "judgment" to mean a decree embodying "the final determination of the rights of the parties in an action or proceeding." Minn. R. Civ. P. 54.02 provides in effect that any order or other form of decision which is not a true "judgment" "shall not terminate the action."

Prior to the adoption of the Minnesota Rules of Civil Procedure in 1952, see Minn. R. Civ. P. 86.01, the termination of a civil

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7/ To suggest, as does the Reilly Tar Memorandum at 43-44, that the City is the "real party in interest" in this proceeding and that the sovereign State of Minnesota has "allowed itself to be used by the City," id. at 44, is an affront to the people of this State and to their government. The State's legislature has appropriated hundreds of thousands of dollars in an attempt to take the first steps to abate the massive environmental contamination left behind by Reilly Tar, and the people of this State are seriously threatened by a potential health hazard. The State obviously has a great stake in the outcome of this litigation.

action was governed by Minn. Stat. §541.12, which provided, in part: "When an action is begun it shall be deemed pending until the final judgment therein has been satisfied." Although this statute was superseded by the adoption of the rules in 1952 and was formally repealed by Minn. Laws 1974, Chapter 394, the rules are consistent with the general principle in that statute that a lawsuit, once commenced, remains pending until final judgment has been entered and satisfied. See also H.L. Spencer Co. v. Koell, 91 Minn. 226, 228, 97 N.W. 974 (1904) (a lawsuit is deemed pending "until there is a final determination of the action").

B. The State's Action Against Reilly Tar Was Properly Commenced, Has Never Been the Subject of a Judgment, and is Still Pending

In its Answer, filed on October 21, 1970, Reilly Tar did not deny that service of the summons and complaint had been effectively accomplished, and did not claim that personal jurisdiction was lacking. Indeed, by asserting its own counterclaim against the City, Reilly Tar voluntarily submitted to the jurisdiction of the Court. In any event, the claims asserted in the State's complaint arose out of activities by Reilly Tar in the State of Minnesota within the meaning of Minn. Stat. §543.19 subd. 1(a) and 1(c)(1976), and any claimed lack of personal jurisdiction would have been frivolous.

No judgment of any kind has ever been entered in this proceeding. While the City and Reilly Tar may have intended that this proceeding be partially terminated by mutual dismissals of the City's claims and Reilly Tar's counterclaims, the State has never consented to dismissal of its claim. See pages 8-16, supra. No order or other form of decision has ever purported to reach a final determination as to the claims of any party. Pursuant to Minn. R. Civ. P. 54.02, the lawsuit by the State against Reilly Tar is still pending. Counsel for the State informed counsel for Reilly Tar of this fact in 1976 and, in response, Reilly Tar did not deny the continued pendency of the action. See Exhibits 5 and 6 to Wyatt Affidavit.

C. Service of the State's Motion for Leave to Amend Was Proper Under the Rules

Minn. R. Civ. P. 5.02 provides for the manner of service of pleadings and other papers in an ongoing action. It specifically provides that, whenever a party is represented by an attorney, service "shall be made upon the attorney unless service upon the party himself is ordered by the court." The State's notice of motion and motion for leave to amend complaint in this proceeding were hand-delivered to Reilly Tar's local counsel and mailed to the Chairman of the Board of the company. Such service complied with the rules and has provided more than ample notice of the motion, particularly in light of the lengthy continuances subsequently obtained by Reilly Tar.

For the foregoing reasons, Reilly Tar's motion to dismiss this action for lack of jurisdiction, see Reilly Tar Memorandum at 36-39, is baseless and should be denied.

III. REILLY TAR'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE SHOULD BE DENIED

The State respectfully submits that Reilly Tar's motion to dismiss for failure to prosecute, see Reilly Tar Memorandum at 49-53, should be denied for the following reasons, any one of which is sufficient to preclude dismissal:

(1) The defense of failure to prosecute is merely one aspect of the doctrine of laches and therefore may not be raised against the State in a civil action in which the State is proceeding in its public, governmental, or sovereign capacity;

(2) A dismissal of an action for failure to prosecute is not appropriate unless the case has been called for trial on a date certain and the plaintiff has failed to appear at the calendar call;

(3) The State's delay in prosecuting this action was reason-

able and blameless because of the difficulty of ascertaining the ultimate injury resulting from Reilly Tar's conduct;

(4) Reilly Tar has not met its burden of affirmatively demonstrating sufficient prejudice to outweigh the State's interest in prosecuting the action; and

(5) Dismissal would be contrary to the basic objective of adjudicating cases on their merits and would work an injustice by allowing the originator of a grave public harm to evade its legal obligations, all at the expense of the public.

A. The Defense of Failure to Prosecute is Merely One Aspect of the Doctrine of Laches, and Therefore May Not Be Raised Against the State in a Civil Action in Which the State is Proceeding in its Public, Governmental, or Sovereign Capacity

1. Dismissal for Failure to Prosecute an Action is Merely One Aspect of the Equitable Doctrine of Laches

It has long been recognized in this State that a court's power to dismiss an action for failure to prosecute is but one aspect of the equitable doctrine of laches. See, e.g., City of Columbia Heights v. John H. Glover Houses, Inc., 300 Minn. 31, 217 N.W.2d 764, 767 (1974); Stevens v. School Bd. of Independent School Dist. No. 271, 208 N.W.2d 866, 867 (Minn. 1973); Davis v. Northern Pacific Ry., 179 Minn. 225, 227, 229 N.W. 86 (1930)(action dismissed for laches where note of issue filed 20 years after complaint); Wheeler v. Whitney, 156 Minn. 362, 364, 194 N.W. 777 (1923); Coleman v. Akers, 87 Minn. 492, 493, 92 N.W. 408 (1902)(laches barred recovery after eight-year delay before moving for default judgment in simple contract action for money damages); Hunt v. O'Leary, 84 Minn. 200, 201, 87 N.W. 611 (1901); St. Paul, Minneapolis & Manitoba Ry. Co. v. Eckel, 82 Minn. 278, 281-82, 84 N.W. 1008 (1901)(laches barred suit after eight-year delay in prosecuting action for ejectment). The relationship of the doctrine of laches to a dismissal for failure to prosecute has been succinctly stated in the commentary: "The doctrine of laches applies to the prosecution of an action after it is begun.

If the plaintiff fails to exercise reasonable diligence in the prosecution, the action may be dismissed." 10B Dunnell, Minnesota Digest §5357 at 294 (1971).

This relationship has been consistently perceived for three-quarters of a century. In Coleman v. Akers, supra at 493, the Court stated:

> The court below simply applied the doctrine that laches, which may have precisely the same consequences as if no action at all had been instituted, may arise from a failure seasonably and diligently to prosecute an action. In other words, the mere institution of a suit does not, of itself, absolve a plaintiff from the charge of laches. [8/]
> . . .

(Emphasis supplied.) In 1974, this perception remained unchanged: "We recognize that laches may be invoked against a party who fails to exercise reasonable diligence in bringing litigation to a close." City of Columbia Heights v. John H. Glover Houses, Inc., supra at 767. Moreover, Reilly Tar has itself recognized the relationship and has conceded that its motion to dismiss for failure to prosecute is based on the doctrine of laches. See Motion to Dismiss at 2 ("The State . . . [is] guilty of laches, thus requiring dismissal pursuant to Rule 41.02(1)"); Reilly Tar Memorandum at 49-53. Cf. id. at 41.

2. The Doctrine of Laches Cannot be Invoked Against the State When It is Proceeding in a Civil Action in Its Public, Governmental, or Sovereign Capacity

In most jurisdictions, the defense of laches does not lie against the government. See Note, "The Application of the Doctrine of Laches in Public Interest Litigation," 56 B.U.L.Rev. 181, 185 & n.19 (1976). While this rule may have had its early origins in the concept of sovereign immunity, it has outgrown those origins and is independently justified as necessary to protect the public from great harm resulting

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8/ As noted at pages 20-24, infra, the State is exempt from the doctrine of laches when pursuing a civil action in its sovereign capacity. The State believes that the converse of the underscored quotation is applicable here: the mere institution of a suit by the State does not subject the otherwise immune State to the doctrine of laches in the new guise of a motion to dismiss for failure to prosecute.

from governmental delay. As the United States Supreme Court noted in Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132-33 (1938):

> The rule . . . that the sovereign is exempt from the consequences of its laches . . . appears to be a vestigial survival of the prerogative of the Crown. . . . But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. . . . "The true reason * * * is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." Story, J., in United States v. Hoar, 26 Fed. Cas. p. 326, 330, No. 15373. . . .

Our own Supreme Court has stated it more succinctly:

> The rights of the public are seldom guarded with the degree of care with which owners of private property guard their rights, and, consequently, acts or omissions which might weigh heavily against private persons cannot always be given the same force against the public. . . .

Parker v. City of St. Paul, 47 Minn. 317, 318-19, 50 N.W. 247 (1891).

There are numerous federal cases 9/ and cases in other jurisdictions 10/ holding that the doctrine of laches may not be invoked

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9/ See, e.g., U.S. Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973); Costello v. United States, 365 U.S. 265, 281 (1961)(laches does not bar 27-year delay prior to denaturalization proceeding); United States v. State of California, 332 U.S. 19, 39-40 & n.22 (1947)("even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government . . . are not to be forfeited as a result"); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132-33 (1938); United States v. One 1973 Buick Riviera Automobile, 560 F.2d 897, 899 (8th Cir. 1977). See also Occidental Life Insurance Co. of California v. EEOC, 97 S.Ct. 2447, 2462-63 (1977)(Rehnquist, J., dissenting).

10/ See, e.g., Monarch Gas Co. v. Illinois Commerce Commission, 366 N.E.2d 945, 949-50, 51 Ill. App.3d 892, 9 Ill. Dec. 434 (5th Dist. App. Ct. 1977); Board of Education of Independent School Dist. No. 48 of Hughes County v. Rives, 531 P.2d 335 (Okl. 1974); Salisbury Beauty Schools v. State Board of Cosmetologists, 268

. . . continued on page 22

against the national government or a state government when proceeding in a sovereign capacity. Many of the state cases denying the defense of laches after long delays involve actions by local governmental bodies to enforce zoning provisions. 11/

So strong is the policy underlying governmental immunity from the defense of laches that several courts have refused to apply the doctrine to suits by private plaintiffs which are in furtherance of a recognized public interest. See, e.g., Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1329 (4th Cir.), cert. denied, 409 U.S. 1000 (1972); Swain v. Brinegar, 378 F.Supp. 753, 757 (S.D. Ill. 1974), rev'd on other grounds, 517 F.2d 766 (7th Cir. 1975); Pacific Greyhound Lines v. Sun Valley Bus Lines, 70 Ariz. 65, 72, 216 P.2d 404, 409 (1950); Perley v. Heath, 201 Iowa 1163, 1165, 208 N.W. 721, 722 (1926). This has been especially true in environmental litigation, where the doctrine of laches has "received a lukewarm reception" because "others than the plaintiff suffer the possible adverse environmental effects." MPIRG v. Butz, 498 F.2d 1314, 1324 (8th Cir. 1974). Accord, Cady v. Morton, 527 F.2d 786, 793 (9th Cir.

10/ . . . continued from page 21

Md. 32, 300 A.2d 367 (1973); Corvallis Sand & Gravel Co. v. State Land Bd., 250 Or. 319, 439 P.2d 575, 581 (1968); State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware, 231 Iowa 784, 2 N.W.2d 372, 400, modified, 4 N.W.2d 869 (1942)(laches may not be invoked against a private plaintiff, suing in the name of and on behalf of the state).

11/ See, e.g., Donovan v. City of Santa Monica, 88 Cal. App.2d 386, 199 P.2d 51, 56 (1948)(20 years); Appeal of Phillips, 113 Conn. 40, 154 A. 238 (1931)(50 years); Gregory v. City of Wheaton, 23 Ill.2d 402, 178 N.E.2d 358, 360-61 (1961)(10 years); Kansas City v. Wilhoit, 237 S.W.2d 919, 925 (Mo. App. 1951); Universal Holding Co. v. North Bergen Township, 55 N.J. Super. 103, 150 A.2d 44, 49 (1959)(8 years); Bartlett v. City of Corpus Christi, 359 S.W.2d 122, 125 (Tex. Civ. App. 1962)(8 years); Fabini v. Kammerer Realty Co., 14 Misc.2d 95, 175 N.Y.S.2d 964, 966-67 (1958)(more than 25 years); City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 109 N.E.2d 597, 599 (1952)(approximately 20 years); Cit o Milwaukee v. Leavitt, 31 Wis.2d 72, 142 N.W.2d 169, 171-72 (196 (19 years).

In the present case, the State did precisely what the Supreme Court has directed. The State brought its action as soon as it knew that some injury had resulted from Reilly Tar's wrongful conduct, even though at the time of commencing the action, the ultimate injury from that conduct remained unknown and unpredictable. Reilly Tar was given precisely the kind of warning which the Supreme Court has favored. Commencement of the action in 1970 put Reilly Tar on notice that the State believed its conduct to have been wrongful and to have resulted in injury. The refusal of the State to dismiss the action in 1973 -- which was expressly noted in a document executed by Reilly Tar -- put Reilly Tar on notice that the State did not agree that the ultimate injury had been rectified. The letter from counsel for the State to Reilly Tar's counsel in 1976 provided yet further warning that the ultimate injury being discovered by the State was profound and would be the subject of prosecution in the action. At no point did Reilly Tar inform the Court that it disagreed with the State's right to pursue in the litigation such ultimate injuries.

Meanwhile, the State attempted to investigate the extent and nature of groundwater contamination and the processes by which it might spread in a multi-layered aquifer formation. This investigation was similar to the visits to numerous physicians by the plaintiffs in Aronovitch v. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953); Elsen v. State Farmers Mutual Insurance Co., 219 Minn. 315, 17 N.W.2d 652 (1945); and Golden v. Lerch Bros., 203 Minn. 211, 281 N.W. 249 (1938). If there is a difference in the type of investigations conducted, it is that the massive groundwater pollution encountered at the Reilly Tar site and the mechanical forces working to disperse that contamination are less well understood and much more difficult and expensive to study than the mechanics of human disease investigated by those plaintiffs' physicians.

The State respectfully submits that it has been unable to find a single reported decision in which the reasons underlying the plaintiff's delay in prosecuting an action have been as compelling as in the present case. In decision after decision, the supreme courts of this State and other jurisdictions have refused to dismiss simple contract actions, simple tort actions, and simple zoning enforcement actions, notwithstanding delays by the plaintiff of five, ten, twenty, and even forty years. See note 11, supra, pp. 28-29, supra, and 36-37, infra. Here, on the other hand, delay has been consumed by costly and intensive investigative efforts by the State to ascertain the true magnitude of a complex environmental harm unfolding beneath the surface of the ground. The State's delay in this instance has not only been reasonable and therefore blameless; the delay has been an inevitable consequence of the rule that plaintiffs should commence actions even while the ultimate injury to be litigated remains unknown or unpredictable.

D. Reilly Tar Has Not Met Its Burden of Affirmatively Demonstrating Sufficient Prejudice to Outweigh the State's Interest in Prosecuting the Action

1. A Defendant Must be Prejudiced by a Delay in Order to Support the Application of Laches, and Prejudice May Not be Presumed or Inferred from the Mere Fact of Delay

The Minnesota Supreme Court has stated on numerous occasions that "[p]rejudice must be shown to one party before laches will apply to preclude the other party from a remedy." Lemmer v. Batzli Electric Co., 267 Minn. 8, 15, 125 N.W.2d 434 (1963). Accord, City of Cloquet v. Cloquet Sand & Gravel, Inc., 251 N.W.2d 642, 645 (Minn. 1977)(eight-year delay in commencing nuisance action did not result in laches); Desnick v. Mast, 249 N.W.2d 878, 883-84 (Minn. 1976); Modjeski v. Federal Bakery of Winona, Inc., 240 N.W.2d 542, 546 (Minn. 1976); Halloran v. Blue & White Liberty Cab Co., 253 Minn. 436, 442 n.4, 92 N.W.2d 794 (1958); Steenberg v. Kaysen, 229 Minn. 300, 310, 39 N.W.2d 18 (1949)(prejudice to the other party is an "essential element to the doctrine of laches").

The requirement that prejudice to the defendant be shown before applying the doctrine of laches has led courts in other jurisdictions to forgive some extraordinary delays prior to commence of an action. See, e.g., Michoud v. Girod, 45 U.S. (4 How.) 503, 560-61 (1846)(delay of almost 30 years after discovery of fraud before suing to set aside conveyance); Kuhn v. Shreeve, 89 S.E.2d 685, 693 (W.Va. 1955)(40-year delay in simple suit on a note). Cf. Costello v. United States, 365 U.S. 265, 282-83 (1961)(finding no prejudice from government's 27-year delay in commencing denaturalization proceeding).

When specifically addressing the propriety of dismissals for failure to prosecute, the Minnesota Supreme Court has expressly held that "prejudice should not be presumed nor inferred from the mere fact of delay." Firoved v. General Motors Corp., 277 Minn. 278, 284, 152 N.W.2d 364 (1967). Accord, Peters v. Waters Instruments, Inc., 251 N.W.2d 114 (Minn. 1977) (six years of utter silence by parties with respect to pending action did not support district court's dismissal for failure to prosecute); Stevens v. School Bd. of Independent School Dist. No. 271, 208 N.W.2d 866, 868 (Minn. 1973) ("The mere fact of delay does not show the requisite prejudice."). In Firoved v. General Motors Corp., supra at 284-85 n.11, the Court recognized that delays of up to ten years in prosecuting an action have been held not to justify a dismissal. See also Unemployment Compensation Division v. Bjornsrud, 261 N.W.2d 396 (N.D. 1977)(five-year unexplained delay in prosecution excused because of lack of prejudice to the defendant).

In assessing whether prejudice to a defendant has resulted from delay in commencing or prosecuting an action, the courts have not forgotten that delay is a two-edged sword which may and often does benefit a defendant. See, e.g., Desnick v. Mast, 249 N.W.2d 878, 883-84 (Minn. 1976)(delay in commencing action enabled defendant to enjoy the benefits of improperly purchased stock for a longer period of time) Sanvik v. Maher, 280 Minn. 113, 116, 158 N.W.2d 206 (1968)(defendants

1975); Davis v. Coleman, 521 F.2d 661, 678 (9th Cir. 1975); Save Our Wetlands, Inc. v. Rush, 424 F.Supp. 354, 355 (D. La. 1976). See also Note, "The Application of the Doctrine of Laches in Public Interest Litigation," 56 B.U.L.Rev. 181, 182 & n.10 (1976); id. at 198 (noting that upholding a laches defense may eliminate a forum for the possible protection of the public interest).

The rule in Minnesota is in accord with that of most jurisdictions, and similarly provides that laches may not be raised as a defense in a civil action brought by the State in its public, governmental, or sovereign capacity. See, e.g., State v. Brooks, 183 Minn. 251, 253-54, 236 N.W. 316 (1931)(doctrine of laches could not be invoked against 13-year delay for collection of inheritance taxes); Board of County Commissioners v. Dickey, 86 Minn. 331, 340, 342, 90 N.W. 775 (1902)(doctrine of laches not applicable to approximately 10-year delay prior to suit by county to recover excess compensation paid to employee); 10B Dunnell, Minnesota Digest §5356 at 294 (1971). In Board of County Commissioners v. Dickey, supra at 342, the Court stated: "It is the well-settled doctrine in this country, founded upon the most substantial dictates of reason and sound policy, that the government cannot be affected by the laches of its agents . . . ." Almost thirty years later, in State v. Brooks, supra at 254, the Court reiterated the rule:

> The delay of the state for so long a time [13 years] in bringing the suit is no defense. The collection of taxes is a governmental or sovereign function of the state, and procrastination or delay on the part of its officers in the discharge of such function is not permitted to prejudice the state's right.

As recently as 1971, the principles governing the application of laches in Minnesota courts to actions by the State were summarized as follows:

> The state and its governmental subdivisions are not affected by the laches of public officers or agents. In other words the doctrine of laches cannot be invoked against the public.
>
> . . . .
>
> The doctrine of laches cannot be invoked against the state proceeding in its public or governmental capacity.

> Defense of laches is not available against government when acting in its sovereign capacity.

10B Dunnell, Minnesota Digest §5356 at 294 (1971).

It is true that, in Minnesota, the doctrine of laches does apply to the State and to municipalities acting in their proprietary capacity. Id. See State v. Gardiner, 181 Minn. 513, 515, 233 N.W. 16 (1930). Cf. State v. Brooks-Scanlon Lumber Co., 122 Minn. 400, 404, 142 N.W. 717 (1913)(dictum). Thus, in State v. Gardiner, supra, the court applied the doctrine of laches to preclude an attempted re-opening by the State of an eleven-year-old settlement with respect to the amount of payment due to the State for the sale of timber. In that case, the State was acting in its proprietary capacity as an owner and vendor of timber and could not avail itself of the usual immunity from the doctrine of laches. See 10B Dunnell, Minnesota Digest §5356 at 294 & n.82 (1971). This proprietary/sovereign distinction with respect to the application of laches is not unique to Minnesota law. See Occidental Life Insurance Co. of California v. EEOC, 97 S.Ct. 2447, 2463 (1977)(Rehnquist, J., dissenting); Note, "The Application of the Doctrine of Laches in Public Interest Litigation," 56 B.U.L. Rev. 181, 186 (1976).

In light of this caselaw, the applicability of the doctrine of laches to the State's delay in bringing the present proceeding to trial hinges on a determination of whether the present action is one brought in the proprietary capacity or in the public, governmental, or sovereign capacity of the State.

3. The Present Action is One Brought in the Public, Governmental, and Sovereign Capacity of the State

A government is acting in its "sovereign" capacity when it "carr[ies] out its unique governmental functions for the benefit of the whole public." United States v. Georgia-Pacific Co., 421 F.2d 92, 101 (9th Cir. 1970). When a State takes action in the

exercise of its police power, it is acting in a sovereign capacity. Note, "The Application of the Doctrine of Laches in Public Interest Litigation," 56 B.U.L.Rev. 181, 186 n.22 (1976).

Specifically, when a State brings an action to enjoin or abate a public nuisance, it is acting in its sovereign capacity. See, e.g., Clearview Land Development Co. v. Pennsylvania, 15 Pa. Commw. 303, 327 A.2d 202 (1974)(suit to enjoin continued operation of a garbage and refuse disposal site in violation of a pollution abatement order); Board of Health of Holbrook v. Nelson, 351 Mass. 17, 217 N.E.2d 777, 779 (1966)(suit by an authorized public agency to enjoin the use of land as a dumping ground is not subject to the defense of laches). See also cases cited in note 11, supra. The present action by the State of Minnesota against Reilly Tar is such an action. The State is seeking damages and injunctive relief to abate a public nuisance which threatens the well-being of thousands of its citizens. It cannot be said that the State is acting "as a private concern" and hence in a proprietary capacity. United States v. Georgia-Pacific, supra at 101.

4. Conclusion with Respect to the State's Immunity from the Defense of Laches

As demonstrated in the foregoing pages, the power of a court to dismiss an action for failure to prosecute is but one aspect of the equitable doctrine of laches. When suing in a civil action in its public, governmental, or sovereign capacity, the State is not subject to the defense of laches. Despite the fairly extensive research underlying the present memorandum, the State has been unable to find a single reported decision in which a civil action, brought by a state in its sovereign capacity, has been dismissed for failure to prosecute.

The State is not suggesting that a court is powerless to impose

sanctions on a recalcitrant governmental plaintiff which flouts court orders and inexcusably drags its heels in a civil action. Such arrogance would rightly be condemned by any court. But the State respectfully suggests that no such conduct is involved in the present proceeding. As we will demonstrate, infra, the delay by the State in prosecuting this action has not been culpable, has not been objected to by Reilly Tar, and has not caused Reilly Tar any prejudice, particularly in light of the fact that the condition complained of in this action is a continuing nuisance which is an appropriate subject for successive prosecutions by the State until such time as it is abated. Under these circumstances, the State respectfully submits that the well-settled rule that it is not subject to the defense of laches when suing in its sovereign capacity should lead this Court to deny Reilly Tar's motion for a dismissal based on failure to prosecute the action.

B. A Dismissal for Failure to Prosecute is Not Appropriate Where, as Here, the Case Has Never Been Called for Trial on a Date Certain and the Plaintiff Has Not Failed to Appear at Any Calendar Call

The Minnesota Supreme Court, recognizing the enormity of the sanction of dismissal, has established a general rule that civil litigation should not be dismissed by a court for failure to prosecute unless it has first been called for trial. Jeurissen v. Harbeck, 267 Minn. 559, 560, 127 N.W.2d 437 (1964)(per curiam). See also 2 Hetland & Adamson, Minnesota Practice 195 (1970). In its most recent decision on this issue, the Supreme Court reiterated the importance of this rule for the protection of plaintiffs and reversed a district court order which had eschewed such leniency:

> Respondents concede that as a general rule a case may not be dismissed for want or prosecution until it has been called for trial. . . . However, we are asked to adopt an exception in the matter before us. We see no valid reason for doing so. Because the case has never been set down for hearing on the merits at a day certain, we reverse.

Breza v. Schmitz, 233 N.W.2d 559, 560 (Minn. 1975).

In the present action, the case has never been set down for a hearing on the merits at a date certain. The State respectfully submits that the present action cannot be dismissed for failure to prosecute without adopting the type of "exception" so recently rejected by the Minnesota Supreme Court. Moreover, for the reasons discussed, infra, such an exception would be wholly inappropriate in this case. 12/

C. The State's Delay in Prosecuting this Action Has Been Reasonable and Blameless Because of the Difficulty of Ascertaining the Ultimate Injury Resulting from Reilly Tar's Conduct

1. To Prevail on a Motion to Dismiss for Failure to Prosecute, the Defendant Must Affirmatively Establish the Existence of Culpable Delay by the Plaintiff

The general rule in Minnesota is that "[d]elay must be culpable in order to become laches, and prejudice must result." Keough v. St. Paul Milk Co., 205 Minn. 96, 106, 285 N.W. 809 (1939), quoting Haataja v. Saarenpaa, 118 Minn. 225, 136 N.W. 871, 873 (1912). Stated another way, "[m]ere delay does not constitute laches, unless the circumstances were such as to make the delay blamable." Elsen v. State Farmers Mutual Insurance Co., 219 Minn. 315, 321, 17 N.W.2d 652 (1945), quoting Lloyd v. Simons, 97 Minn. 315, 317, 105 N.W. 902, 903 (1906). See also Peterson v. Schober, 192 Minn. 315, 327, 256 N.W. 308 (1934).

In the context of dismissals for failure to prosecute, where the Minnesota Supreme Court has confronted actions in which the

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12/ The Supreme Court has also stated that dismissals with prejudice should be based on considerations of willfulness and contempt for the authority of the court or the litigation process. See Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 116 (Minn. 1977). See also 2 Hetland & Adamson, Minnesota Practice 195 (1970). Cf. O'Neill v. Kelly, 239 N.W.2d 231, 232 (Minn. 1976). The State respectfully submits that it has not willfully disobeyed any court order or shown contempt for the court's authority or the litigation process.

plaintiff has offered no justification for the delay, the Court has rightfully characterized such delays as "wholly unexcused." See, e.g., Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 116 (Minn. 1977); General Minnesota Utilities Co. v. Carlton County Cooperative Power Association, 221 Minn. 510, 524, 22 N.W.2d 673 (1946) (dictum); St. Paul, Minneapolis & Manitoba Ry. v. Eckel, 82 Minn. 278, 281-82, 84 N.W. 1008 (1901)(eight-year delay in pursuing lawsuit for ejectment "wholly unexplained"). See also Electro Nuclear Systems Corp. v. Telex Corp., 205 N.W.2d 127 (Minn. 1973)(decision mentions no proferred explanation for failure to prosecute eight-year old complaint based on an oral contract); Davis v. Northern Pacific Ry., 179 Minn. 225, 229 N.W. 86 (1930)(court mentions no proferred explanation for 20-year delay between complaint and note of issue); Wheeler v. Whitney, 156 Minn. 362, 365, 194 N.W. 777 (1923). Similar logic has led the Court to bar new actions after unexplained delays under the doctrine of laches. See, e.g., Sinell v. Town of Sharon, 206 Minn. 437, 439, 289 N.W. 44 (1939)(more than 62-year delay in suing to enforce a municipal order to have a road built); Corah v. Corah, 246 Minn. 350, 354-55, 75 N.W.2d 465 (1956)(18-year delay after divorce decree before seeking alimony).

Where the delay in bring a new action or prosecuting an existing action is reasonable, however, the court will excuse it and refuse to apply the doctrine of laches. See, e.g., City of Columbia Heights v. John H. Glover Houses, Inc., 300 Minn. 31, 217 N.W.2d 764, 767 (1974)(six-year delay in prosecution of existing lawsuit explained by pendency of related suit); Sanvik v. Maher, 280 Minn. 113, 115-16, 158 N.W.2d 206 (1968)(suit not barred by laches where six-year delay between likely discovery of property restriction violation and suit was explained by reliance on parallel lawsuit by village); Aronovitch v. Levy, 238 Minn. 237, 244, 56 N.W.2d (1953)(character of injury not fully understood); Elsen v. State Farmers Mutual Insurance Co., 219 Minn. 315, 320-21, 17 N.W.2d 652 (1945)(nine-year delay after initial settlement of lawsuit did not result in laches because there

was a mutual mistake of fact as to the "full measure of the injuries"); State v. Johnson, 216 Minn. 427, 428, 13 N.W.2d 26 (1944) (more than five-year delay in prosecution of paternity action explained by inability to arrest defendant); State ex rel. City of Duluth v. Duluth St. Ry. Co., 88 Minn. 158, 161, 92 N.W. 516 (1902)(nine-year delay before suing for specific performance of a contract to build a railway line found to be reasonable). See also Kuhn v. Shreeve, 89 S.E.2d 685, 688, 693 (W.Va. 1955)(forty-year delay before filing of lawsuit on simple note excusable because plaintiffs did not wish to deprive a widow of her home).

There are two categories of excuses for delay previously recognized by the Minnesota Supreme Court which have particular relevance to this action. The first category has to do with cases in which the character of the injury has either changed during the period of delay or has been newly discovered to be much more severe than previously thought. Elsen v. State Farmers Mutual Insurance Co., 219 Minn. 315, 17 N.W.2d 652 (1945), was such a case. There, a plaintiff who had been struck by an automobile entered into a settlement agreement and dismissal of an action, approved by the court, on the assumption that his injuries were of a particular nature. Nine years later, the trial court vacated the prior settlement and dismissal because of the discovery, during the intervening years, that the injuries were of a different character and much more severe than originally thought. The Supreme Court affirmed the trial court's rejection of the doctrine of laches:

> [T]he court was justified in viewing the injuries actually received as distinct and different from those which all parties considered that plaintiff had sustained. The evidence supported a finding of mutual mistake, a mistake which was shared by the court. . . .
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> . . . .
>
> Defendants contend that plaintiff was guilty of laches in seeking to set aside the order of approval. . . . [B]ut the full measure of the injuries did not develop until 1942, when the last of the three operations was performed. . . .

Id. at 320-21 (emphasis supplied).

In the present case, there has not been any settlement based on a mutual mistake as to the "full measure of the injuries" because the State has proceeded cautiously and has refused to dismiss the action in the light of the uncertainties with respect to the ultimate damage. If an improvident settlement could be reopened in the Elsen case on the basis of a new understanding of the "full measure of the injuries," a fortiori, where the State in the present case has never entered into a settlement agreement, the doctrine of laches should not be applied. See also Aronovitch v. Levy, 238 Minn. 237, 244, 56 N.W.2d 570 (1953)(excusing three-year delay before suing to reform written liability release because the delay was necessary to consult additional physicians about the injuries). Cf. Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 379-80, 173 N.W. 805 (1919)(refusing to bar a nuisance suit under the doctrine of laches where the character of defendant's nuisance changed and became more obnoxious after twelve years of operation).

A second accepted excuse for delay is ignorance of one's rights or of the true factual situation. See, e.g., Young v. Blandin, 215 Minn. 111, 120, 9 N.W.2d 313 (1943)(unauthorized stock investments by trustee); Keough v. St. Paul Milk Co., 205 Minn. 96, 105-06, 285 N.W. 809 (1939); Peterson v. Schober, 192 Minn. 315, 327, 256 N.W. 308 (1934); Craig v. Baumgartner, 191 Minn. 42, 47, 254 N.W. 440 (1934). The Court recognized in Keough v. St. Paul Milk Co., supra at 127 that "[i]gnorance with justification is a recognized excuse for delay. . . ." Similarly, the Court noted in Young v. Blandin, supra at 120 that "[w]hether delay was culpable or not depends on many circumstances, among which are actual or imputable knowledge of the facts."

2. The State's Investigative Delay in Prosecuting this Action, Rather than Being Culpable, Has Been an Unavoidable Result of the Minnesota Rule that a Cause of Action Accrues and Should be Sued on When Some Injury is Known, Even Though the Ultimate Injury May Remain Unknown and Unpredictable

The Minnesota Supreme Court has expressly recognized that actionable wrongs sometimes have delayed effects, and that resulting injuries do not always conveniently manifest themselves at the time of the wrongful act. Accordingly, the rule in Minnesota with respect to accrual of a cause of action for purposes of the running of the statute of limitations is that the cause of action does not accrue until damage has resulted. See, e.g., Bonhiver v. Graff, 248 N.W.2d 291, 296 (Minn. 1976)(negligent failure of defendants to discover misappropriation of funds); Karjala v. Johns-Manville Products Corp., 523 F.2d 155, 159-60 & n.7 (8th Cir. 1975)(asbestosis); Continental Grain Co. v. Fegles Construction Co., 480 F.2d 793, 797 (8th Cir. 1973) (negligent design and construction of grain drier); Dalton v. Dow Chemical Co., 280 Minn. 148, 154, 158 N.W.2d 580 (1968) (occupational disease); Golden v. Lerch Bros., Inc., 203 Minn. 211, 220-21, 281 N.W. 249 (1938)(silicosis); Thorton v. Turner, 11 Minn. 237, 240 (1866)(private nuisance resulting from flooding behind dam).

Even this apparently simple talisman is very difficult to apply to certain commonly encountered situations -- such as occupational diseases -- where an injury develops only over a long period of time and does not abruptly manifest itself at some "magic moment." Karjala v. Johns-Manville Products Corp., supra at 159 n.7, 160. In Golden v. Lerch Bros. Inc., supra, the Court recognized that the occupational disease of silicosis "came about by slow processes . . . over a long period of time," id. at 221, and accordingly ruled that the burden was on the defendant to establish the date on which the injury had sufficiently ripened to start the running of the statute of limitations. Id. at 220-21. In the subsequent case of Dalton v. Dow Chemical Co., supra, the Court clarified the principle governing such gradually developing injuries:

> Ordinarily there is a coincidence of negligent act and the fact of some damage. Where that occurs the cause of action comes into being and the applicable statute of limitations begins to run even though the ultimate damage is unknown or unpredictable. . . . Until there is some damage, there is no claim and certainly a statute prescribing the time in which suit must be filed . . . can never operate prior to the time a suit would be permitted.

Id. at 154, quoting United States v. Reid, 251 F.2d 691, 694 (5th Cir. 1958) (emphasis supplied). This rule has been applied by the federal courts in a Minnesota case in Continental Grain Co. v. Fegles Construction Co., supra at 797:

> It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.

It should be noted that this accommodation of the statute of limitations to situations in which injury develops only gradually means that, of necessity, diligent and alert plaintiffs must bring lawsuits at a time when the ultimate injury from the defendant's conduct remains unknown and unpredictable. The Supreme Court has ruled that such actions must be filed somewhat prematurely at the risk of forfeiting the cause of action. Such a rule obviously presents a quandary to prospective plaintiffs, and would be particularly onerous if it were coupled with the requirement that such actions must be vigorously prosecuted to a conclusion while the ultimate injury remained "unknown or unpredictable." A legal regime which forced a plaintiff to reduce his claim to judgment at a time when he still could not know or predict the ultimate injury suffered at the hands of the defendant would be monstrously unfair.

It is precisely for this reason that the changing character and severity of the injury is recognized as a legitimate excuse to a charge of failure to prosecute. See pp. 29-30, supra. The proposition that a cause of action accrues even while the ultimate injury is unknown and unpredictable and the proposition that the changing character and severity of the injury will excuse a charge of failure to prosecute are and must be corollaries.

Delay in reducing certain types of claims to judgment will always be inevitable because of the gradually developing nature of the injury resulting from some types of wrongful conduct. This is true of many occupational diseases, of negligent design of structures, and of harmful substances which are slowly but inexorably migrating beneath the site of an old industrial dump. Once this reality is confronted, it becomes clear that such inevitable delays in perceiving ultimate injury and reducing the action to judgment do not stem in any way from the culpability of the plaintiff. The Supreme Court has candidly recognized that mechanical forces beyond the control of the plaintiff may leave the ultimate damage unknown or unpredictable for some time. The Court could have concluded that a cause of action for such injuries does not accrue and the statute of limitations on such a cause of action does not begin to run until the ultimate injury is, in fact, known or predictable. The inevitable delay in prosecuting the claim would thus occur prior to commencement of the suit. Such a rule, while protecting plaintiffs, would deny even minimal warning to defendants and would make it more difficult for defendants to begin building their defense at a time when witnesses and evidence were relatively fresh.

Instead, the Supreme Court has determined as a matter of public policy that, inevitable though the delay may be, it should occur as much as possible after the filing of the lawsuit. This rule may be harsh to plaintiffs, as in Dalton v. Dow Chemical Co., 280 Minn. 148, 158 N.W.2d 580 (1968), where a plaintiff was denied recovery for his debilitating occupational disease because he did not commence his action at a time when the ultimate injury remained "unknown or unpredictable." But the rule provides protection to defendants by providing the earliest possible notice of a claim; under this rule, the defendant may begin to preserve evidence and build his defense even though the trial may have to be postponed until the full measure of the injury manifests itself.

were allowed to enjoy a prohibited use of their land during the period of delay); Costello v. United States, 365 U.S. 265, 282-83 (1961)(enjoyment of citizenship during delay prior to denaturalization proceedings). Particularly where it is the government which has delayed bringing or prosecuting a civil action, the only reliance which the defendant can show is its reliance on a hoped-for nonenforcement of the law, a type of reliance which is arguably never justifiable, see Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 14 (D.C. Court of Appeals 1978)(Mack, J., dissenting), and which is especially not justifiable where the State has in fact commenced an action, refused to dismiss it, and notified the defendant by letter that ongoing investigations have disclosed severe injuries which the State intends to pursue in the action. In part because of this two-edged nature of a delay in prosecuting an action, courts have recognized that a defendant's failure to bring such delay to the court's attention is a factor to be weighed when ruling on a subsequent motion to dismiss for failure to prosecute. See, e.g., Unemployment Compensation Division v. Bjornsrud, 261 N.W.2d 396, 398 (N.D. 1977); Finley v. Parvin/Dohrmann Co., 520 F.2d 386, 391 (2d Cir. 1975). In the latter case, affirming a trial court's determination to deny a dismissal motion notwithstanding three years of inactivity in a proceeding, Judge Friendly stated:

> In our view, the correct rule is that the failure of a defendant to call the court's attention to a plaintiff's undue delay in bring a case on for trial, by formal motion or otherwise, may be considered as a factor in informing the court's discretion.

Id. at 392. In the present case, the failure of Reilly Tar to bring the prosecutorial delay to the attention of the Court in the face of warnings by the State that it intended to pursue the action undercuts its claim that it has been prejudiced by the delay.

2. The Ordinary Expenses of Preparation and Readiness for Trial are Not Sufficient Prejudice to a Defendant to Justify Dismissal

Obviously, any defendant would prefer to walk away from a lawsuit. The defense of any action is burdensome and therefore, in a sense, "prejudicial." However, when linking the doctrine of laches to a showing of prejudice to the defendant, the courts are not speaking of the ordinary expenses of preparation and readiness for trial. See Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 117 (Minn. 1977)(cost of securing testimony is not sufficient prejudice to justify dismissal); Dupay v. Krugers, Inc., 285 Minn. 523, 524, 172 N.W.2d 567 (1969); Firoved v. General Motors Corp., 277 Minn. 278, 283, 152 N.W.2d 364 (1967).

Thus, in Firoved v. General Motors Corp., supra at 283, the Supreme Court stated:

> Obviously, the prejudice to plaintiff of such a dismissal [with prejudice] is certain and usually permanent. As to defendant, the ordinary expense and inconvenience of preparation and readiness for trial, which can be adequately compensated by the allowance of costs, attorney's fees, or the imposition of other reasonable conditions, are not prejudice of the character which would justify . . . a dismissal with prejudice. . . .

The prejudicial effect of alleged loss of evidence necessary to the defense of an action is frequently claimed by a defendant and should be viewed cautiously by the Court. This is particularly true where the defendant has been on notice of a pending action and has had the ability to preserve necessary evidence, and where any alleged loss of evidence is balanced by the need on the part of the plaintiff to develop evidence as to the true nature of the ultimate injury. The courts have not been swayed by vague references to dim memories and other proof problems and have refused to hold that the death of possible witnesses is conclusive of prejudice. See, e.g., Aronovitch v. Levy, 238 Minn. 237, 244, 56 N.W.2d 570 (1953); Keough v. St. Paul Milk Co., 205 Minn. 96, 106-07, 285 N.W. 809 (1939). Instead, the Minnesota Supreme Court has taken the position that any such claim of

prejudice to the defendant must be judged by the standard of whether the lapse of time has made it so difficult to ascertain the facts that "a substantial chance of arriving at an erroneous decision exists." Knox v. Knox, 222 Minn. 477, 486, 25 N.W.2d 225 (1946). Moreover, the loss of evidence must cast doubt on "the exact facts upon which the rights of the parties depend." Aronovitch v. Levy, 238 Minn. 237, 243, 56 N.W.2d 570 (1953), quoting Sweet v. Lowry, 123 Minn. 13, 16, 142 N.W. 882, 883 (1913).

3. Reilly Tar Has Failed to Establish the Existence of Any Prejudice Sufficient to Outweigh the State's Interest in Pursuing this Action

When tested against the foregoing caselaw, requiring a substantial demonstration of meaningful prejudice to the defendant, it is clear that the prejudice alluded to by Reilly Tar in its pleadings is not sufficien to outweigh the State's interest in prosecuting this action. Reilly Tar has specified as prejudice: (1) the "unavailability of [unidentified] witnesses and the dimming of memories of the [sic] others," Reilly Tar Memorandum at 46-47; (2) the company's loss of records in "good faith reliance on the meeting of the minds of all parties," id. at 47; (3) the increased damages to which the company may now be made subject, id.; (4) the alleged running of certain statutes of limitations, id.; (5) the loss of "the time and money expended in negotiating th[e] settlement," id. at 48; and (6) a "sacrifice for no purpose" of the discount which it took on the sale of the property. Id.

With respect to the first two claimed aspects of prejudice, Reilly Tar has not alleged, nor does the State believe that it could allege, such loss of evidence that "a substantial chance of arriving at an erroneous decision exists." Knox v. Knox, 222 Minn. 477, 486, 25 N.W.2d 225 (1946). It would be wholly incredible, after having owned the property for 56 years, for the company to deny that the coal tar and creosote wastes contained in the saturated soil and groundwater were placed there by its operations. The State respectfully submits that

proof of "the exact facts upon which the rights of the parties depend," Aronovitch v. Levy, 238 Minn. 237, 243, 56 N.W.2d 570 (1953), has not been affected by the investigatory delay. Indeed, Reilly Tar does not make any claim to the contrary. Moreover, any claimed "reliance" on the settlement agreement was obviously not justified, because the State has never settled this action and the conduct of the company's attorney in 1976 confirmed his awareness of this fact. See pp. 8-16, supra.

Assuming, as the Court must for purposes of the motion to dismiss, that Reilly Tar was culpable in creating the serious potential health hazard which now presents itself at its old site, the State cannot agree that the prospect of increased damages because of a more complete understanding of the injury is the kind of prejudice which courts should recognize. Those increased damages are the consequences of Reilly Tar's conduct and are not the result of any conduct by the State. For the same reason, the State cannot agree that there is "no purpose" to be served by "sacrificing" the discount which Reilly Tar took in selling the property; there is ample purpose to be found in the redressing of the rights of the public for the wrong suffered at the hands of the company.

Because the nuisance presented by Reilly Tar's conduct is a continuing one which may properly be made subject to successive actions for damages until abated, see pages 41-44, infra, there is no merit to Reilly Tar's claim that it will be prejudiced by the loss of the alleged protections of the statutes of limitations.

Finally, the loss of time and money expended in negotiating the settlement with the City is entitled to no more weight than the ordinary expenses of preparation and readiness for trial. Such expense are not sufficient prejudice to justify dismissal of an action. See pp. 38-39, supra. Moreover, the claim that such expenses led to a settlement with the State is factually erroneous. See pp. 8-16, supra.

4. The Lack of Any Prejudice to Reilly Tar is Further Demonstrated by the Fact that the Conditions Complained of by the State Constitute a Continuing Nuisance Which May Properly be Made the Subject of Successive Suits for Damages

Reilly Tar's assertion of prejudice is necessarily predicated on the assumption that, if the present action is dismissed, no further actions by the State will be possible. This assumption is in error, because the conditions complained of by the State constitute and, unless abated, will in the future constitute a "continuing nuisance" which may properly be made the subject of successive suits for damages.

The doctrine of "continuing nuisance" is well-settled in American law. A "permanent nuisance" is one which has such a character and exists under such circumstances that it is "at once necessarily productive of all the damage which can ever result from it." 58 Am. Jur.2d Nuisance §117 at 683 (1971). Where a permanent nuisance arises, a cause of action for damages must ordinarily be brought within the period of the relevant statute of limitations or is forever barred, and all damages are recoverable in the one judicial proceeding. Id. §132 at 701-02. A "continuing nuisance," on the other hand, is one where:

> [T]he injury is not complete, so that the damages can be measured in one action at the time of the creation of the nuisance, [and the injury] depends upon its continuance and the uncertain operation of the seasons or the forces set in motion by it . . . .

Id. at 702. Where a continuing nuisance arises, the statute of limitations does not begin to run until injury occurs and, even then, so long as the nuisance persists, successive suits may be brought to recover damages which have accrued within the statutory period next preceding commencement of the action. Id. Stated another way, a continuing nuisance is one which is terminable because it is subject to abatement. Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 341 (1932). See also Annot., "Wrongful Pollution of Stream by Municipality as Creating Single Cause of Action or Successive Causes

of Action," 75 A.L.R. 529 (1931).

The doctrine of continuing nuisance, with the concomitant right to engage in successive suits for damages until the nuisance is abated, is firmly established in Minnesota. See, e.g., Skinner v. Great Northern Ry., 129 Minn. 113, 117, 151 N.W. 968 (1915)(dam resulting in upstream flooding); Bowers v. Mississippi & Rum River Boom Co., 78 Minn. 398, 402-03, 81 N.W. 208 (1899) (sole affirmative act by defendant of putting up pilings established continuing nuisance due to erosion of plaintiff's land by ice); Matthews v. Stillwater Gas & Electric Light Co., 63 Minn. 493, 495, 65 N.W. 947 (1896)(a defendant may not obtain a prescriptive right to pollute, notwithstanding the statutes of limitations); Lamm v. Chicago, St.P., M. & O. Ry. Co., 45 Minn. 71, 76-78, 47 N..W 455 (1890); Sloggy v. Dilworth, 38 Minn. 179, 182-83, 36 N.W. 451 (1888)(erection of a dam); Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212, 214, 36 N.W. 339 (1888); Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41, 44-45, 11 N.W. 124 (1881) ("the action is not for damages for a permanent injury . . . but for consequential damages from a wrong which may be remedied"); Adams v. Hastings & D. R. Co., 18 Minn. 236, 238-41 (1871); Harrington v. St. Paul & S. C. R. Co., 17 Minn. 188, 197, 203-04 (1871)("In cases . . . of continuing trespass, where every day gives plaintiffs a fresh cause of action," laches will not bar equitable relief and, if abatement does not occur, multiple suits for damages are proper). See also Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 376-77, 379-80, 173 N.W. 805 (1919). Cf. Dalton v. Dow Chemical Co., 280 Minn. 147, 153, 154-55, 158 N.W.2d 580 (1968).

There can be no doubt that the carcinogenic substances lying beneath the surface of the ground at Reilly Tar's former site of operations pose a classic example of a continuing nuisance under this doctrine. The injury is not complete and depends upon "the uncertain operation of the seasons or the forces set in motion by it." 58 Am. Jur.2d Nuisance §132 at 702. Indeed, it is the very uncertainty of the

operation of those forces which has led to the delay in prosecuting this action. Moreover, the nuisance is one which can be terminated or abated, and the relief sought by the State is aimed at precisely such abatement. See Exhibit 1 to Wikre Affidavit at vii ("The control of groundwater movement . . . to prevent the spread of the coal-tar derivatives is technically feasible"). Indeed, the Supreme Court of Montana concluded on very similar facts that a continuing nuisance was presented by past dumping of glue into a ditch, resulting in phenol pollution of a plaintiff's well. See Nelson v. C & C Plywood Corp., 154 Mont. 414, 465 P.2d 314, 1 ERC 1131, 1139 (1970).

The continuing nature of the nuisance is not affected by the fact that the defendant is no longer engaging in any affirmative conduct. See Skinner v. Great Northern Ry., 129 Minn. 113, 117, 151 N.W. 968 (1915); Bowers v. Mississippi & Rum River Boom Co., 78 Minn. 398, 402-03, 81 N.W. 208 (1899); Sloggy v. Dilworth, 38 Minn. 179, 182-83, 36 N.W. 451 (1888). It is enough that the forces of nature, acting in conjunction with the structure or condition left in the wake of the defendant's affirmative conduct, continues to cause injury to the plaintiff. The test is "whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act." Bowers v. Mississippi & Rum River Boom Co., supra at 402. Nor is the continuing nature of the nuisance excused by the fact that the original act was not negligent or was performed for a good purpose. Id. at 404.

Moreover, the actor who has caused the continuing nuisance to arise remains liable for successive actions for damages and cannot release himself from a duty to respond in continuing damages by conveying the nuisance to another through a voluntary deed. See Sloggy v. Dilworth, 38 Minn. 179, 182, 36 N.W. 451 (1888). In that case, which involved the erection of a dam followed by periodic flooding of plaintiff's land, the Court stated:

> The rule . . . supported by the great weight of authority is that the originator of a nuisance remains liable to successive actions for damages resulting from the maintenance thereof. . . .
>
> He who erects a nuisance is liable for the damages arising from the erection, and also for the continuance thereof. The erection may of itself cause no injury . . . [b]ut special damage may subsequently arise from its continuance, and so, while but one action can be maintained for its erection, repeated actions may be brought for its continuance. . . . And the originator is . . . accordingly liable for damages, and he cannot release himself from his duty to remove it by his voluntary deed. . . . Every continuance of the nuisance or recurrence of the injury is an additional nuisance, forming in itself the subject-matter of a new action. . . .

Id. at 182-83.

In light of this solid body of caselaw, Reilly Tar's present assertion that, having discharged large quantities of carcinogenic substances to the soil, it can nevertheless walk away from any liability, despite the inexorable movement of those substances toward public water supplies used by up to one-quarter of a million persons, is plainly erroneous. In seeking to impose a liability on the originator of this public health hazard, the State is not relying on causes of action or remedies which have been created by the courts in the past few years of environmental awareness; instead, the State is relying on a firmly established common law doctrine which has been the law of this State for more than a century.

Because the State could bring a series of new actions for damages caused by the continuing nuisance at the old Reilly Tar site, 13/ Reilly Tar cannot demonstrate prejudice resulting from the investigatory delay which has been necessary to ascertain the true nature of the ultimate injury caused by this continuing nuisance.

13/ Jurisdiction to bring such an action in Minnesota will unquestionably lie under Minn. Stat. §543.19 subds. 1(a), 1(c), and 3 (1976), and service of process will be possible under Minn. Stat. §303.13 subd. 1 (1976).

E. A Dismissal With Prejudice Under Rule 41.02(1) Is a Dismissal on Procedural Grounds and Should Be Granted Only in Exceptional Circumstances Because it is a Drastic Form of Relief Contrary to the Basic Objective of Adjudicating Cases on Their Merits

The Minnesota Supreme Court has recognized that an order of dismissal for failure to prosecute is an extraordinary sanction which should not be lightly employed. In Firoved v. General Motors Corp., 277 Minn. 278, 283-84, 152 N.W.2d 364 (1967), the Court stated:

> An order of dismissal on procedural grounds runs counter to the primary objective of the law to dispose of cases on the merits. Since a dismissal with prejudice operates as an adjudication on the merits, it is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court or for failure to prosecute. It should therefore be granted only under exceptional circumstances. . . .
>
> . . . [W]e must be mindful that the policy which seeks to dispose of litigation on the merits rather than on procedural grounds is, except in extraordinary circumstances, of overriding importance. . . .

See also Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 116-17 (Minn. 1977); Nyberg v. Cambridge State Bank, 245 Minn. 312, 314-15, 72 N.W.2d 345 (1955) ("even a litigant who has a poor lawsuit is entitled to his day in court"). Similarly, the Court has noted that "[l]aches is an equitable defense and ought not to be applied in a way that would do injustice." Keough v. St. Paul Milk Co., 205 Minn. 96, 107, 285 N.W. 809 (1939).

In the final analysis, this Court's determination on the issue of a possible dismissal with prejudice must, as with all questions in equity, be a product of the informed judgment of this Court, acting in its discretion. The State respectfully submits that the overwhelming public importance of the present action cries out for a denial of Reilly Tar's motion to dismiss for failure to prosecute and that, under the circumstances, such a dismissal is not warranted.

There is ample authority cited in this memorandum to demonstrate that delays in litigation, regrettable though they may be, do in fact

occur. Often those delays have greatly exceeded the time period which is at issue here. The State and its agencies are not omniscient. When faced with a difficult factual puzzle like that lying beneath the surface of the ground at the old Reilly Tar site, the State must act through individuals who apply their expertise in an attempt to solve the puzzle. If the time consumed in analyzing the situation is the "fault" of any party, it is the fault of Reilly Tar, which placed the substances in a location where they are so difficult to detect and analyze. Moreover, it is one thing to dismiss an action on procedural grounds where the wrongful nature of defendant's conduct is doubtful; it is quite another to allow a defendant whose liability is quite obvious to avoid a civil suit on procedural grounds. Justice and equity require that culpable defendants such as Reilly Tar should not be permitted to evade their legal obligations merely because of reasonable and unavoidable delay in prosecution of an action. See Peters v. Waters Instruments, Inc., 251 N.W.2d 114, 117 (Minn. 1977).

For the foregoing reasons, the State respectfully submits that a dismissal of the present action for failure to prosecute or for laches would not be proper and would be inequitable.

IV. REILLY TAR'S MOTION FOR A SUBSTITUTION OF PARTIES -- WHICH IS REALLY A MOTION TO DISMISS IN DISGUISE -- IS A PREMATURE EFFORT TO OBTAIN AN ADJUDICATION ON THE MERITS OF A DISPUTED FACTUAL MATTER WHICH WILL BE AMPLY ADDRESSED AT TRIAL PURSUANT TO THE CITY'S PROPOSED REQUEST FOR A DECLARATORY JUDGMENT

Reilly Tar has moved, in the alternative, for the substitution of the City as the sole defendant in this action. The effect of this motion, if granted, would be to dismiss the action against Reilly Tar. The States believes that such a substitution would be wholly inappropriate at this time, and would require the Court to enter, in effect, a summary judgment with respect to the Seventh Claim of the Complaint in Intervention which the City is seeking leave to file.

As we have demonstrated, the originator of a continuing nuisance in Minnesota is liable for successive damage suits until such time as the nuisance is abated, and cannot relieve itself of such liability by conveying a deed to a third party. See pp. 41-44, supra; Sloggy v. Dilworth, 38 Minn. 179, 182, 36 N.W. 451 (1888). Accordingly, the fact that Reilly Tar has conveyed the site to a third party and has left the State is of no relevance to the State's claim for damages and for abatement of the nuisance. The presumption of the law is that Reilly Tar, as the originator of the nuisance, remains liable.

If such a presumption is to be overcome by the existence of an agreement entered into between the City and Reilly Tar, it is the State's view that the agreement must be pleaded as a defense to the State's action. In particular, under these circumstances, it must be pleaded as a defense to the Amended Complaint following a grant by this Court of leave to amend. Once this proper sequence of pleading has taken place, the construction and effect of the agreement may receive a full ventilation at trial. The Complaint in Intervention proferred by the City presents an ample mechanism for determining the effect of the hold harmless agreement. Any review of the agreement or its effect at this time, given the factual disputes which surround it, would be premature.

Should the Court conclude, however, that some review of the effect of the hold harmless agreement may be undertaken at this time, the State believes that the application of that agreement to the current groundwater problem is doubtful, in light of the new discovery of carcinogenic substances in the saturated soil and water. The federal courts have recently concluded that, under Minnesota law, such a momentous change in the circumstances of environmental contamination actually requires nullification of written agreements with public authorities which might otherwise allow the originator of the harm to escape liability.

In United States v. Reserve Mining Co., 394 F.Supp. 233 (D. Minn. 1974), modified and affirmed sub nom., Reserve Mining Company v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975), the State had entered into a stipulation agreement with the company allowing the discharge of a certain amount of pollutants to the air. The court noted:

> [T]he quality of the discharge into the ambient air took on a different character when it was discovered that millions of carcinogenic fibers were among the emissions from Reserve's stacks. This fact was not discovered until after the stipulation agreement had been entered into. Whereas certain levels of emission of relatively harmless particles may be acceptable to the state, the same level of emission of carcinogenic fibers may not. To the extent that contract principles are operative, the agreement could be rescinded on the grounds of mutual mistake as to an essential element of the bargain. See Stanton v. Morris Const. Co., 159 Minn. 380, 199 N.W. 104 (1924). Furthermore . . . [t]he State cannot bargain away its police power to protect the health of its citizens.

Id. at 243 (emphasis supplied). In affirming this aspect of the district court's ruling, the Eighth Circuit Court of Appeals stated:

> [T]he stipulation . . . cannot shield Reserve from an abatement order based on the existence of a hazard to health from the air emission, for evidence of this hazard had not yet surfaced when Minnesota and Reserve entered into the stipulation.

Reserve Mining Co. v. Environmental Protection Agency, supra at 524. Moreover, despite the fact that Reserve's discharge to the waters of Lake Superior had been authorized by a permit from the State, Reserve was still held liable for the costs of filtration of those waters for public use. See United States v. Reserve Mining Co., 408 F.Supp. 1212 (D. Minn. 1976).

In the present case, Reilly Tar's discharge to the surface of the ground at its former site was wholly unauthorized by any governmental body and, as indicated in the proposed amended complaint at paragraph 15, was carried out in violation of a statutory requirement that a permit be obtained. Because the State's affirmative authorization of discharges by Reserve Mining Company did not relieve that company of

liability to abate the continuing effects of its pollution by carcinogenic substances, a fortiori, Reilly Tar must be liable for the continuing injury caused by its wholly unauthorized release of carcinogens to the public environment.

V. THE PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT SHOULD BE GRANTED

In the foregoing pages, the State has painstakingly demonstrated the inappropriateness of dismissing the presently pending action. The State has previously supplied its arguments in support of its motion for leave to amend complaint, see Memorandum of Law in Support of Plaintiff's Motion for Leave to Amend Complaint (April 11, 1978), and will not repeat them here.

The State would merely remind the Court that leave to amend a complaint "shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. For the reasons set forth in the State's prior memorandum of law and in the present memorandum, the State respectfully submits that leave to amend the complaint in the manner sought by the present motion will serve the interests of justice.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that Reilly Tar's motions for dismissal of the action or, in the alternative, a substitution of the City as the sole defendant be denied by the Court, and that the Court grant the State's motion for leave to amend its complaint.

Respectfully submitted,

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Dated: June 21, 1978

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Robert C. Moilanen, being first duly sworn, hereby deposes and says that in the City of Minneapolis, County of Hennepin, on the 21st day of June, 1978, he served the foregoing Plaintiff's Memorandum of Law in Opposition to Defendant's Motions and in Support of Plaintiff's Motion for Leave to Amend Complaint; Affidavit of Mary E. Wyatt, Affidavit of Dale L. Wikre; Affidavit of Robert J. Lindall; Affidavit of Donald R. Albin; and Affidavit of Richard L. Wade, by hand delivering true and correct copies thereof to the following:

William T. Egan, Esq.
Rider, Bennett, Egan & Arundel
900 First National Bank Building
Minneapolis, Minnesota 55402

Wayne G. Popham, Esq.
Popham, Haik, Schnobrich, Kaufman & Doty, Ltd.
4344 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Robert C. Moilanen

Subscribed and sworn to before me this 21st day of June, 1978:

MARY E. WYATT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Oct. 24, 1983

Mary E. Wyatt
Notary Public

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

State of Minnesota, by the Minnesota Pollution Control Agency, Plaintiff, and City of St. Louis Park, Intervenor-Plaintiff, vs. Reilly Tar & Chemical Corporation, Defendant.	File No. 670767 COMPLAINT IN INTERVENTION

Intervenor-plaintiff City of St. Louis Park for its claims against defendant states:

AVERMENTS APPLICABLE TO ALL CLAIMS

1. The City of St. Louis Park (hereafter City) is a municipal corporation duly organized and existing under the laws of the State of Minnesota.

2. Reilly Tar & Chemical Corporation (hereafter Reilly Tar) is a corporation established under the laws of the State of Indiana.

3. The claims against Reilly Tar arise from acts committed in the course of its business in the State of Minnesota, City of St. Louis Park, at a time when it was registered to do business in this State.

EXHIBIT A

005326

4. Reilly Tar was engaged in the business of distilling coal tar products and creosote impregnation of wood products in the State of Minnesota, City of St. Louis Park.

5. In the course of its business, Reilly Tar brought upon its land and stored coal tar, the products of coal tar distillation including creosote, and coal tar wastes, all of which are substances not naturally present with the land.

6. Reilly Tar discharged these coal tar products and distillation wastes onto its land and failed to undertake reasonable and adequate safeguards and methods of storage permitting the escape of these substances onto the land, contaminating the soil at its business site as well as adjacent soil.

7. The coal tar products and distillation wastes have moved from the surface of the soil downward to the underground waters resulting in the contamination of those waters with phenols and carcinogenic polynuclear aromatic hydrocarbon (PAH) compounds.

8. The contamination of the underground waters resulting from Reilly Tar's conduct poses an imminent threat to the source of drinking water of the residents of the City and consequently the public health, which threat is continually increasing in magnitude because of the natural movement of the underground waters laterally and horizontally.

9. Underground waters are a protectable natural resource of the State of Minnesota.

10. Reilly Tar by its conduct has polluted, impaired, and destroyed this protectable natural resource of underground waters and the continuing nature of the harm is likely to further pollute, impair, and destroy that natural resource thereby materially adversely affecting the environment.

11. The present and likely future pollution, impairment, and destruction of the underground waters presents a threat to the public health of the residents of the City.

12. As a result of Reilly Tar's conduct, the City has incurred and will incur considerable expense in an amount that cannot now be determined but which is estimated to be millions of dollars. These expenses relate to the quantification of the scope of the damage, the determination of the appropriate remedial response, and the delay in undertaking public projects because of the underground water contamination.

13. The original complaint in this action, as served on October 2, 1970, by the PCA and the City, raised claims of surface water and air pollution separate and distinct from the claims of underground water contamination now asserted. At the time of the previous action there was no known damage to underground waters as a result of Reilly Tar's conduct.

14. On February 23, 1971, Reilly Tar announced that it would close its operations in the City of St. Louis Park effective September, 1971. As of the latter date Reilly Tar did discontinue its processing operations, thereby essentially terminating the air and surface water discharges which had been the basis for the original complaint.

15. Following the announced termination of operations, Reilly Tar indicated its intent to offer its property for sale. The City became interested in purchasing the property as part of an urban renewal plan for the area. On April 14, 1972, the City agreed to purchase the property from Reilly Tar. A condition of the purchase agreement was the dismissal with prejudice by the PCA and the City of the surface water and air pollution claims of the original complaint.

16. At that time, neither the City, the Minnesota Department of Health, nor the PCA were aware of an existing threat to the source of drinking water of the residents or of possible

carcinogens in the groundwaters because of Reilly Tar's operations. The City would not have purchased the property had it known those facts.

17. After certain delays in the federal funding for the purchase, a closing was finally scheduled on the property for June 19, 1973. As of the week prior to the closing, the PCA had yet to approve the cleanup plans for the site and so did not then want to execute a dismissal of the suit. Reilly Tar objected to a further delay of the closing and proposed to accept as a substitute, in lieu of the required dismissal by the PCA, a hold harmless agreement from the City against the surface water and air pollution claims of the PCA.

18. At that time, neither the City, nor the Minnesota Department of Health, nor the PCA were aware of the existence of possible carcinogens in the underground waters as a result of Reilly Tar's creosoting operations. The City would not have purchased the property nor given a hold harmless agreement had it been advised or known of those facts.

19. With the understanding that there were no significant cleanup problems on the site, the City gave the hold harmless agreement to Reilly Tar as a substitute for the dismissal expected to be given by the PCA as soon as the details of the site cleanup plan had been agreed to by the PCA and the City. The intention of the City in giving the hold harmless agreement was to accomplish only that which Reilly Tar would have secured by receipt of the anticipated PCA dismissal: protection against liability for surface water and air pollution. Any broader indemnification would have been ultra vires the City, contrary to public policy and void. No additional consideration was paid by Reilly Tar for any indemnification going beyond the claims presented in the original complaint.

20. On June 21, 1973, the property was conveyed by quitclaim deed from the City to the Housing and Redevelopment Authority of St. Louis Park, Minnesota.

21. Neither the City nor the PCA by its proposed amended complaint are asserting claims against Reilly Tar for surface water and air pollution.

22. Studies conducted by the Minnesota Department of Health since 1974 have now indicated the presence of certain carcinogenic substances in the underground water which present a threat to public health.

FIRST CLAIM

23. Reilly Tar has polluted, impaired and destroyed and continues by its inaction to pollute, impair, and destroy a protectable natural resource of the State of Minnesota, underground waters, in violation of the Minnesota Environmental Rights Act, M.S.A. §116B.01, et seq.

SECOND CLAIM

24. Reilly Tar is strictly liable for the contamination of the underground waters and consequent threat to the public health resulting from its discharge and the escape into the soil of coal tar products and distillation wastes.

THIRD CLAIM

25. Reilly Tar has materially damaged by contamination underground waters creating a threat to the public health of the residents of the City and is liable for the resulting public nuisance.

FOURTH CLAIM

26. The contamination of the underground waters is the result of Reilly Tar's negligence in the distillation of coal tar and the storage of coal tar products and waste.

FIFTH CLAIM

27. The distillation of coal tar and storage of coal tar products and wastes within the City of St. Louis Park, Minnesota, constituted an abnormally dangerous activity because of the presence of carcinogenic PAH substances which presented a serious risk of harm to the residents of the City.

28. Reilly Tar voluntarily engaged in this abnormally dangerous activity with knowledge, either actual or constructive, of the serious risk of harm and is strictly liable for the resulting contamination of the underground waters.

SIXTH CLAIM

29. Reilly Tar has contaminated the underground waters and has materially damaged the City's vested property right to the use of those waters for the benefit of its residents.

SEVENTH CLAIM

30. This claim is for declaratory and supplemental relief brought pursuant to the provisions of the Uniform Declaratory Judgment Act, Minnesota Statutes Chapter 555.

31. There exists between the City and Reilly Tar an actual, justiciable controversy with respect to the construction or validity of the hold harmless agreement between those parties in respect to which the City needs a declaration of rights by the Court.

32. Reilly Tar claims that the hold harmless agreement is effective and so broad as to protect it against the claims for underground water contamination asserted by the PCA in its proposed amended complaint.

33. The City claims that the hold harmless agreement was intended to and does protect Reilly Tar only against claims for surface water and air pollution asserted by the PCA in the original

complaint, which claims are not now asserted; that the hold harmless agreement does not protect Reilly Tar against claims for underground water contamination for that was not the intent of the parties, no consideration was received for such a broad indemnification, and, indeed, such a broad indemnification would be void as ultra vires the City and against public policy. Moreover, should the hold harmless agreement be so broad as to protect Reilly Tar against its contamination of underground waters, the agreement is void for reason that it was executed under mutual mistake as to material facts.

WHEREFORE, intervenor-plaintiff City of St. Louis Park prays for judgment as follows:

1. As to its First Claim, imposing such conditions upon Reilly Tar & Chemical Corporation as shall be proven necessary to protect against the further pollution, impairment, and destruction of underground waters and abate the continuing harm.

2. As to its Second through Sixth Claims, awarding judgment against Reilly Tar & Chemical Corporation in that amount found to compensate the City for expenses incurred and to be incurred as a result of the underground water contamination.

3. As to its Seventh Claim, construing the language of the hold harmless agreement and declaring that it does not protect Reilly Tar & Chemical Corporation against claims for underground water contamination.

4. For such other and further relief as is just and reasonable.

Dated: April 18, 1978.

POPHAM, HAIK, SCHNOBRICH, KAUFMAN & DOTY, Ltd.

By /s/ Wayne G. Popham
Wayne G. Popham

And /s/ Allen Hinderaker
Allen Hinderaker
4344 IDS Center 335-9331
Minneapolis, Minnesota 55402
Attorneys for Intervenor-Plaintiff City of St. Louis Park

Exhibit 1

REILLY TAR & CHEMICAL CORPORATION

CABLE ADDRESS
RETAR, INDIANAPOLIS

11 SOUTH MERIDIAN STREET
INDIANAPOLIS, INDIANA 46204

June 19, 1970

VIA AIR MAIL SPECIAL DELIVERY

Mr. Chris Cherches,
City Manager
City of St. Louis Park
5005 Minnetonka Boulevard
St. Louis Park, Minnesota 55416

Dear Mr. Cherches:

Your letter of June 5, 1970, has been reviewed and, as has been our Company policy, we shall endeavor to comply with the City's Ordinances and requests. Contrary to the tone of your letter, much time, effort, and money has been expended in the last ten years toward plant improvement. Many of the steps that have been taken are well known to your staff and members of the Council.

Our operation has undergone continual change, reflecting constant improvement in the processing. Each new feature, such as liquid shipment of Electrode Binder Pitch, is entered into with the idea in mind of improving the acceptability of our operation to the City.

With regard to the water question, you are now, after fifty years, vitally concerned about our water run-off; yet, in the past years you have had no concern about the water crossing the plant property but have deliberately drained your streets to go over our property. Time and again we have brought the problem to the City's attention and walked the property with former Managers, explaining the problems the City was creating in our attempts to control our operation. Extremely poor planning on the City's part in the past resulted in the misdirection of large volumes of water onto our property, causing flooding and untimely plant emissions. We take strong objection to your claim that the soil is contaminated. We have used Creosote Oil in weed control throughout the plant property for many years, but this is only effective on a year-to-year basis with no permanent residual left in the soil. If you will compare the area we have with the area of asphalt streets in the City of St. Louis Park, we believe you will see the smallness of our portion of the problem.

Mr. Chris Cherches
City of St. Louis Park

June 19, 1970

Our plans include the discharge of plant wastes into a sanitary sewer. In the construction of our sewer, we would intend to make a normal connection consistent with the policies of the City in effect for industrial sewage connection. It is our decision to begin with the plans for the connection to the sewer as soon as practicable. Before other drainage matters can be resolved, it will be necessary for the City to discontinue the direction of water onto the plant property. We are looking forward to working with the City in relation to the water discharge from the plant and feel certain that a satisfactory solution to the discharge of water from the plant property can be obtained.

It is our intention to improve the housekeeping practices carried on in the operations of the creosoting plant here in St. Louis Park although this will be difficult as long as water is discharged into the plant. We believe that we can promise you one of the neatest creosoting plants in the country as soon as the water problem is resolved.

With regard to the possibility of air contamination, the Company's attention has been devoted to the improvement of air quality. Our problem has been one mainly of odor from a small quantity of odoriferous material reaching the atmosphere. At the time of the introduction of the Air Pollution Ordinance in the City of St. Louis Park, we knew of no method of evaluating odor nor did any technical process for odor control exist for the coal tar refinery odors. Several concerns were contacted with regard to our distillation operation and in each occasion their knowledge was limited and the service they wished to perform was that of studying and gaining information about our operation. It was decided that a study by our own Company would be more logical than having an outside concern going off in all directions. We instituted a program of study and control shortly after the Ordinance was in effect, and we are making progress toward the goal of air pollution.

We wish to continue to cooperate with the City in its efforts to improve the environment of the City of St. Louis Park and would appreciate your cooperation in assisting us to improve the community.

REILLY TAR & CHEMICAL CORPORATION

Mr. Chris Cherches
City of St. Louis Park

June 19, 1970

In respect to the Louisiana Avenue right-of-way question discussed by the members of the City Council and the Company officers at a conference held in the Golden Valley Golf Club on the evening of May 12, 1970, the Company has the following suggestions:

1. Sell to the City the proposed right-of-way area (as per the City's plan).

2. In addition, because this taking will eliminate rail service to all of the remaining Company property and will require the Company to shut down and remove the plant, the Company will ask damages for removal or destruction of plant facilities, inventory, and resultant loss of income.

3. An agreement on time to complete removal of plant and inventory. This factor will influence damages in 2. The Company proposes a period of ten years from the date an agreement is made for transfer of possession of the proposed right-of-way.

4. During that period certain agreements providing for reasonable precautions for water and air problems will be necessary. The Company proposes that the sewer connection be made at once.

5. The Company desires continuation of the zoning of its property as it is now except that possible changes to multiple or commercial may be desirable. The Company intends, if an agreement is reached, to employ expert planners on its own to consider new uses for the land.

6. The City will refrain from further punitive tax assessments on Company property during the period.

7. The City will have to acquire any railroad rights or easements from the railroad independently.

REILLY TAR & CHEMICAL CORPORATION

Mr. Chris Cherches
City of St. Louis Park

June 19, 1970

We are currently working on the amounts involved in items 1 and 2 and will be prepared to present these data in the near future.

Very truly yours,

REILLY TAR & CHEMICAL CORPORATION

T. J. Ryan
Vice President

TJR:LS

cc: Mr. T. E. Reiersgord
Yngve, Yngve & Reiersgord
6250 Wayzata Boulevard
Minneapolis, Minnesota 55416

Mr. H. L. Finch - St. Louis Park Plant

Exhibit 2

YNGVE, YNGVE & REIERSGORD
ATTORNEYS AT LAW
6250 WAYZATA BOULEVARD
MINNEAPOLIS, MINN. 55416

ANTON YNGVE
ESTHER YNGVE (1894-1968)
ALBERT B. YNGVE
THOMAS E. REIERSGORD
MARSHALL G. ANDERSON
CAMILLA REIERSGORD

544-8451

July 23, 1971

Office of Attorney General
Minnesota Pollution Control Agency
717 Delaware Street S.E.
Minneapolis, Minnesota 55440

Re: Case No. 670767
Calendar No. 78815
State of Minnesota, et al vs.
Reilly Tar and Chemical Corporation

ATTENTION: Robert J. Lindall
Special Assistant Attorney General

Dear Mr. Lindall:

I was out of town when your letter, dated July 8, 1971, arrived concerning the calendar placement of the State's case vs. Reilly Tar and Chemical Corporation.

Perhaps you may not be aware that the company determined several months ago to close down their St. Louis Park plant and they are now in the process of doing so.

You may or may not also know that the company has offered the entire 80 acres to the city, and the city and the company are presently negotiating for the purchase of the property.

My present understanding is that the refinery portion of the operation will be discontinued in either August or September of 1971 and the wood treatment phase of the operation will be concluded in September of 1972. No new lumber has been delivered into the plant property for treatment for several months and the remaining operations are directed at completing the treatment of the lumber that was on hand when this decision was made. This decision was communicated to the city some time ago and the discussions about the sale to the city have been pending now for a number of months.

The company informed its employees of the termination of plant operations several months ago, but did not see fit to make any public announcement of this move and I do not believe that it was picked up by either of the Twin City

newspapers or television.

At any rate, it seems to me that the issues in the lawsuit are moot except for the possibility of the counter-claim by the company for damages by reason of the flooding by the city. However, until we have a better chance to see how the sale negotiations work out, I do not believe it would be prudent to set the case up for trial. Therefore, I would suggest that you ask the clerk to strike the case for settlement, subject to being reinstated if the anticipated settlement fails to materialize.

Very truly yours,

YNGVE, YNGVE & REIERSGORD

Thomas E. Reiersgord

dcl
cc: Wayne G. Popham

Exhibit 3

POPHAM, HAIK, SCHNOBRICH, KAUFMAN & DOTY, LTD.

900 FARMERS & MECHANICS BANK BUILDING
MINNEAPOLIS 55402

TELEPHONE 335-9331
AREA CODE 612

WAYNE G. POPHAM
RAYMOND A. HAIK
ROGER W. SCHNOBRICH
DENVER KAUFMAN
DAVID S. DOTY
ROBERT A. MINISH
ROLFE A. WORDEN
RUDY K. STEURY
G. MARC WHITEHEAD
BRUCE D. WILLIS
FREDERICK S. RICHARDS
RONALD C. ELMQUIST
ROBERT H. ZALK
GARY R. MACOMBER

July 30, 1971

Assignment Clerk
Hennepin County District Court
Room 316A
Hennepin County Court House
Minneapolis, Minnesota

Re: State of Minnesota, et al vs. Reilly Tar and Chemical Corporation; Case Number 670767
Calendar No. 78815; Our File Number 3857-11

Dear Sir:

This letter will confirm my telephone conversation with your office on the above date relative to the above matter.

I hereby request that the above case be stricken subject to reinstatement by any counsel at any time. I have discussed this matter with Thomas E. Reiersgord, Esq., attorney for the defendant, and he is in agreement with this request.

Very truly yours,

Gary R. Macomber

GRM:nmc

cc: Robert J. Lindall

Exhibit 4

MINNESOTA POLLUTION CONTROL AGENCY
717 Delaware Street S.E./Minneapolis, Minnesota 55440

June 15, 1973.

Rolfe A. Worden
Popham, Haik, Schnobrich, Kaufman & Doty, Ltd.
4344 IDS Center
Minneapolis, Minnesota 55402

RE: MPCA and City of St. Louis Park v. Reilly Tar and Chemical Corp.

Dear Mr. Worden:

I am writing this letter to confirm my understanding of the status of the above-entitled matter in light of our meeting today.

We will not be in a position to consider a dismissal of our complaint against Reilly until we have received and reviewed a proposal from the City of St. Louis Park for eliminating potential pollution hazards at the Republic Creosote site. With this in mind, it has been suggested that the appropriate individuals from the PCA staff and from the City of St. Louis Park meet at their earliest mutual convenience to discuss the scope of the problems and possible alternatives for solving them.

To allow time for gathering further information and for submitting a proposal, the City of St. Louis Park will attempt to delay the closing of its real estate transaction with Reilly until August 15, 1973.

Thank you for visiting our office today to discuss this matter. Please contact the undersigned if you have any questions.

Yours very truly,

Jack Van de North
Special Assistant, Attorney General
MPCA

JV/sja

PRINTED ON 100% RECYCLED PAPER

005261

Exhibi 5

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

Address Reply To:
OFFICE OF ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1935 W. County Road B2
Roseville, Minnesota 55113
612/296-7342

July 9, 1976

Wayne G. Popham, Esq.
Popham, Haik, Schnobrich,
Kaufman & Doty
4344 IDS Center
Minneapolis, Minnesota 55402

Thomas E. Reiersgord, Esq.
Yngve & Reiersgord
6250 Wayzata Boulevard
Wayzata, Minnesota 55416

RE: MPCA & City of St. Louis Park v. Reilly Tar & Chemical Corporation Civil File No. 670767

Gentlemen:

In November, 1975, the Minnesota Pollution Control Agency contracted with Barr Engineering Company to conduct a soil and groundwater study at the former Republic Creosote site. This study was in response to the concerns of this Agency and the Minnesota Department of Health that the presence of an undefined quantity of creosote material in the soil on the site creates potential surface and groundwater pollution problems.

The Barr Engineering study is being conducted in two phases. On May 17, 1976, the MPCA received the Phase I Barr report. After reviewing this report, the MPCA Staff concluded that:

1. Visible and analytically detectable amounts of coal tar contaminants are present in the top 15 feet of all general areas of the site;

2. The amount of coal tar contaminants in the soil increases from north to south;

3. Visible contamination of the soil exists between Walker and Lake Streets;

4. Benz(a)Pyrene and Chrysene are present at various depths of the contaminated soils; and

5. The shallow groundwater on the site is moving in a southerly direction.

These findings suggest that a serious contamination problem exists at the former Republic Creosote site which may give rise to surface and groundwater pollution and may require corrective action. However, a final assessment of the degree and extent of this contamination cannot be made until the Phase II Barr report is submitted to the Agency. It is anticipated that this phase of the study will be completed in Fall, 1976.

You are advised that the MPCA considers the above-referenced suit to be viable and that it continues to remain active litigation. This notice is being sent to insure that you continue to be involved in this matter in whatever manner you deem appropriate.

Very truly yours,

Jay M. Heffern

Jay M. Heffern
Special Assistant
Attorney General

JMH/mg

cc: Richard A. Wexler
Assistant Attorney General
Department of Health
Louis Breimhurst
Dale Wikre

Exhibit 6

YNGVE & REIERSGORD
ATTORNEYS AT LAW
6250 WAYZATA BOULEVARD
MINNEAPOLIS, MINN. 55416

Say file
MPCA & SLP
v Reilly Tar
St Chem
844-8451

July 28, 1976

ANTON YNGVE
ESTHER YNGVE (1894-1968)
ALBERT B. YNGVE
THOMAS E. REIERSGORD
CAMILLA REIERSGORD

Mr. Wayne Popham, Esq.
Popham, Haik, Schnobrich,
Kaufman & Doty
4344 IDS Center
Minneapolis, Minnesota 55402

RE:Our File 10-251

Dear Mr. Popham:

I received your letter dated July 19, 1976 concerning Reilly Tar & Chemical Company. No attached letter was enclosed with your letter; however, I received a letter from the Pollution Control Agency on the same subject and I assume the letters were the same.

As you will recall during the negotiations for the sale of the property, the city promised that the state would dismiss the case if the city purchased the land from the company. Then after the sale terms were agreed upon, the personnel at the Pollution Control Agency reneged on their agreement. Accordingly, the city gave a holdharmless agreement to the company.

Obviously, the sale price for the property was less than it might have been because of all the circumstances. Also, the litigation was prompted by the city. No notice was ever given to the company. The commission went ahead on an ex party basis at the request of the city to commence this litigation. Accordingly, I believe that the precedings of the Pollution Control Commission are defective and this litigation should be dismissed on that ground.

In my opinion, the holdharmless agreement puts the city in the landowners role and they will have to deal with the Pollution Control Agency.

Very truly yours,

YNGVE & REIERSGORD

Thomas E. Reiersgord

TER:mk

cc: Pollution Control Agency ✓